86-725 (1)

No. ______

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROY E. DOOLEY, JR., et al.,

Petitioners,

v.

AMERICAN AIRLINES, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

A. Section 204(g) of the Employee Retirement Income Security Act ("ERISA") prohibits an employer from amending a pension plan in a manner which decreases a participant's accrued benefits. Section 402(b)(4) of ERISA requires each plan to be maintained pursuant to a written instrument which, among other things, specifies the basis on which benefit payments are to be made. American Airlines changed the discount rate used to calculate the lump-sum optional form of the normal retirement benefit under its pilots' retirement plan from 8½% to a floating rate which, in 1981 and 1982, was significantly higher than 8½%, with the result that pilots retiring during that period received substantially reduced lump-sum payments. The Seventh Circuit Court of Appeals found that American did not violate Section 204(g) of ERISA because the plan expressly authorized American to set the discount rate and the change in the rate resulting from American's exercise of that discretion did not constitute a plan "amendment".

The questions presented are:

(1) Whether a plan provision which permits an employer, in its discretion, to determine one or more of the bases on which benefit payments are to be made, satisfies the requirements of Section 204(g) of ERISA and the broad remedial purposes of ERISA.

(2) Whether the Seventh Circuit's restrictive reading of ERISA Section 204(g)'s prohibition of plan amendments having the effect of reducing accrued benefits, in which the court either excludes from the term "amendment" discretionary employer changes in the actuarial assumptions used to calculate the lump-sum optional form of benefit, or else treats those assumptions as not part of the "plan" for purposes of that Section, is consistent with the language and broad remedial purposes of ERISA.

(3) Assuming that Section 402(b)(4) of ERISA requires specification in the Plan document of the basis of benefit payments in a manner which precludes employer discretion, or that the actuarial assumptions used for purposes of determining the equivalence of optional forms of benefit are part of the "plan" and changes in those assumptions therefore constitute "plan amendments" under Section 204(g), did American's change in assumptions result in decreases in petitioner's accrued benefits?

B. The IRS in 1979 gave existing pension plans like American's until 1984 to comply with the Internal Revenue Code requirement that actuarial assumptions, such as the discount rate at issue in this case, be included in the formal Plan document. Such action served to preserve American's tax deduction. The question presented is:

Whether the IRS has the authority to relieve American of its pre-existing substantive fiduciary duties to petitioners and other Plan participants under Title I of ERISA by postponing the date on which American must comply with corresponding tax code provisions when such authority, to the extent that it is granted at all, is delegated solely to the Secretary of Labor.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners Roy E. Dooley, Jr., Thomas F. Latta, Lionel T. Alexander, Lowell W. Armstrong, Buford O. Baker, W.S. Baugh, Alvin O. Berg, Jr., E. G. Bielinski, John W. Blute, Vincent R. Bradley, William H. Burgess, Hugh T. Clark, Byron S. Cramblet, Frank J. Cusare, Clarence O. Day, Jr., E.R. Dozier, Clyde E. Driggers, R. M. Euwema, J. R. Fitzgerald, William D. Fulton, Ralph E. Green, Walter J. Gromel, William J. Goeke, Frank G. Hart, F. J. Hazzard, Howard F. Jenkins, Jr., James G. Johnson, Frank Kaplowitz, Norman L. Kleman, W.C. Kraemer, A. P. Lang, H. D. Leavell, Ralph W. Long, Jr., Dale F. Mabry, Joseph K. Marks, Robert W. Martin, Boniface J. Mayer, Edward O. McKown, Jr., Harold R. Miller, H. C. Milton, George A. Moculski, Earl M. Morrow, Stanley R. Nielsen, Arne E. Oas, George A. Oden, Wayne C. Parris, Robert K. Parsons, Angelo B. Perriello, J. C. Pollard, Edward C. Price, Russell A. Quandt, John J. Ranck, Harvey R. Rice, H. E. Rogers, W. J. Roth, J. M. Rutledge, R. C. Speck, and Willard I. Staples, and the respondents American Airlines, Inc., the American Airlines, Inc., Fixed Income Plan of the Pilot Retirement Benefit Program, G. E. Overbeck, T. G. Plaskett, T. F. Quinn, Jr., C. A. Pasciuto and N. W. Byl. The above named petitioners and respondents include all of the parties to the proceedings below and in this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above proceeding on August 5, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 797 F.2d 1447; it is reprinted in Appendix A hereto, p. A-1, *infra.* The memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division (Parsons, J.) is unreported; it is reprinted in Appendix A hereto, p. A-15, *infra.*

JURISDICTION

Petitioners brought this action in the United States District Court for the Northern District of Illinois, invoking federal jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) and 29 U.S.C. § 1132(e). On April 17, 1985, the district court

denied petitioners' motion for summary judgment on Count I of their third Amended Complaint and granted respondents' motion for summary judgment on Counts I to IV inclusive. *See* p. A-15, *infra*.

On August 5, 1986, the Seventh Circuit affirmed the district court with respect to Count I and reversed with respect to Counts II-IV. *See* p. A-1, *infra*. Petitioners did not seek rehearing.

The jurisdiction of this Court to review the judgment below rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This action involves the application and interpretation of the following Sections of the Employee Retirement Income Security Act (ERISA): 3(1), (2), and (3); 204(g); 402(a); 402(b)(4); 414 and 502(a). 29 U.S.C. §§ 1002(1), (2), and (3); 1054(g); 1102(a); 1102(b)(4); 1114 and 1132(a). Sections 411(d)(6) and 7805(b) of the Internal Revenue Code are involved, 26 U.S.C. §§ 411(d)(6) and 7805(b), as well as Section 1.401-1(b)(1)(i) of the Income Tax Regulations. Each of these authorities is reprinted in Appendix B, B-1, *infra*.

STATEMENT OF THE CASE

Nature of the Case

Petitioners are fifty-eight airline pilots who retired from service with American Airlines, Inc. at various dates between February 1, 1981 and October 1, 1982. (Dk. No. 67, ¶¶ 2(a)-(eee); Dk. No. 81, ¶¶ 2(a)-(eee.)[1]

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[1] For purposes of this petition, the reference "Dk. No." refers to the Docket Number of the cited document in the Record on Appeal, as transmitted from the district court.

Respondents, sued in their capacities as ERISA fiduciaries, are American Airlines, Inc., the American Airlines, Inc. Fixed Income Plan of the Pilot Retirement Income Program (the "Plan"), and five individual members of American's Pension Benefits Administration Committee (referred to, collectively, as "American"). Petitioners seek to recover benefits due them and to enforce their rights under the Plan, pursuant to Section 502(a) ERISA, 29 U.S.C. § 1132(a).[2]

The Pleadings

The dispute arises from American's change in the interest rate used to calculate the lump-sum optional form of retirement benefit under the Plan. Effective February 1, 1981, American changed the discount rate used to calculate the present (lump-sum) value of a participant's normal retirement annuity from a fixed rate of 8½% to a variable rate of 1% greater than the prevailing interest for corporate bonds rated Aaa by Moody's Investor Services, a change which, during the relevant time period, virtually doubled the interest rate used. As a result, when petitioners retired and elected the lump-sum optional benefit, they received on an average appoximately 30% less than they would have received had their lump sums been computed using an 8½% assumption. The economic savings realized by the Plan as a result of reduced payments to petitioners (and other participants electing lump-sum benefits in 1981 and 1982) is passed through to American, by operation of the actuarial cost method used by the Plan, in the form of reduced future contributions over a fifteen-year period.

Count I of the Third Amended Complaint (Dk. No. 67) alleged that, as implemented by American,[3] the change in

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[2] Section 502(a) as well as the other stututes and regulations relevant to petitioners' claims are reproduced in Appendix B.

[3] Petitioners do not contend that American may not alter or increase the interest assumption. Petitioners contend only that, in making such changes, American may not reduce the amount

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interest assumption constituted a Plan amendment resulting in an impermissible reduction in petitioners' accrued benefits in violation of Section 204(g) of ERISA, 29 U.S.C. § 1054(g).[4] In their Answer (Dk. No. 81), respondents contended that the change in interest assumption "had the purpose of maintaining the actuarial equivalence of lump-sum distributions to the Plan members" (*Id.* ¶ 10, p. 35), and denied that adoption of the change was improper.

Proceedings and Disposition in the Courts Below

Petitioners moved for partial summary judgment as to liability on Count I of their Third Amended Complaint on the ground that, as a matter of law, the change in the interest assumption constituted a violation of Section 204(g) of ERISA. (Dk. Nos. 69-70, 104-06.) Respondents filed a cross-motion for summary judgment on the ground that the change in interest assumption constituted administrative action permitted by the Plan. They also sought summary judgment as to Counts II, III and IV on various grounds. (Dk. Nos. 83-85, 113-14, 118.)

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of participants' lump-sum entitlements based on their service up to the date of the change. *See Rev. Rul.* 81-12, 1981-1 C.B. 228 (describing methods for changing interest assumptions without reducing accrued benefits).

[4] Count II alleged that the variable interest rate adopted by American was unreasonably high during the relevant period and resulted in lump-sum benefits which were less than actuarially equivalent to the annuities to which petitioners were entitled, in violation of the vesting provisions of Section 203 of ERISA, 29 U.S.C. § 1053. Count III alleged that the change in interest assumption was motivated by respondents' desire to secure for American the economic benefit of the reduced lump-sum payments, in violation of Section 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A), which requires respondents as Plan fiduciaries to discharge their duties solely in the interest of the participants and beneficiaries. Count IV sought injunctive relief against the wrongful conduct asserted in Counts I through III.

The district court, on April 17, 1985, pursuant to a Memorandum Opinion and Order which refers only to the issues as to Count I, denied the Pilots' motion for partial summary judgment and granted American's motion for summary judgment as to all Counts of the Third Amended Complaint. (Dk. No. 119.)

On appeal, the Seventh Circuit affirmed the district court's judgment as to Count I and reversed as to Counts II through IV. No party sought rehearing.

The American Fixed Income Plan of the Pilot Retirement Benefit Program

The American Airlines Plan is a "defined benefit pension plan" which provides that, upon retirement at age 60, a pilot is entitled to receive a Basic Retirement Annuity consisting of a monthly pension equal to 1.25% of his final average compensation multiplied by a number equal to one less than the number of years of his credited service. (Dk. No. 67, ¶¶ 3(b), 5, 7, Exhibit A; Dk. No. 81, ¶¶ 3(b), 5, 7.)

Under Section 10.2 of the Plan, the normal benefit is a qualified joint and survivor annuity in the case of married participants and a single life annuity in the case of unmarried participants. (Dk. No. 67, Ex.A, § 10.2, pp. A37-38.) Section 10.4 of the Plan gives a participant the right to elect his benefit in one of a number of optional forms. (Dk. No. 67, Exhibit A, ¶ 10.4, pp. A39-41.)

Adoption of the Lump-Sum Optional Form of Benefit Discounted at 8½%

Prior to October 1978 the Plan did not provide for a lump-sum form of benefit. (Dk. No. 67, ¶ 7; Dk. No. 81, ¶ 7.) Section 10.4(c) of the Plan provided:

> (c) *Open Option.* A member may elect, if the Administrator consents thereto on a basis of policies uniformly applicable to all Members similarly situated, to receive his or her Basic Retirement Annuity . . . in an optional

> form other than one specifically provided in this Section . . .

Section 10.4 also provided that "[a]ny optional form of Basic Retirement Annuity elected pursuant to this Section shall be the Actuarial Equivalent of an annuity payable for the lifetime of the member only in an annual amount equal to such Basic Retirement annuity. . . ." Article II, § (d) of the plan document defines "actuarial equivalent" as "the equivalent in value on the basis of actuarial factors *approved from time to time by American Airlines. . . .*" Article II, § (d) (emphasis added).

On October 26, 1978, American issued Employee Bulletin No. 547-78 announcing the adoption of a lump-sum optional benefit. The Bulletin stated in part:

> The Company and the Allied Pilots Association have agreed to allow lump sum distributions at retirement from the Pilot Retirement Benefit Plan. This form of payment would be granted under the Open Option and is offered in addition to the various forms of payment provided under the Plan.
>
> Distributions will be based on the annual benefit otherwise provided under the Plan multiplied by a lump-sum annuity factor. The factor is developed using an 8½% interest rate and the 1971 Group Annuity Mortality Table. . . . (Dk. No. 67, Exhibit B.)

Thus the lump-sum option, at its inception, involved an 8½% fixed actuarial assumption which was used to discount to present value the total payments a pilot would otherwise have received under his Basic Retirement Annuity.

The Change in the Interest Assumption

In December 1979, by Employee Bulletin No. 497-79[5], American announced that, for pilots retiring after January

[5]Though dated December 26, 1979, the Bulletin did not actually reach the employees until January 3, 1980. (Deposition of

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1, 1981, the interest assumption used to calculate lump-sum distributions under the Plan would be changed:

> Effective for retirements after January 1, 1981, the interest rate used in calculating lump sum distributions from the American Airlines Retirement Benefit Plans will be a rate one percentage point higher than the Moody's Aaa Corporate Bond Rate for the second month preceding the retirement date. Thus, if a participant retires June 1, the rate used in calculating a lump sum distribution will be the Moody's Aaa Corporation Bond Rate for April, plus one percentage point. . . . (Dk. No. 67, ¶ 8, Exhibit C; Dk. No. 81, ¶ 8.)

On April 22, 1980, in Employee Bulletin No. 161-80, American modified the variable interest assumption. (Dk. No. 67, ¶ 9, Exhibit D; Dk. No. 81, ¶ 9.) The Moody's Aaa Corporate Bond Rate used was changed to the rate for the third month prior to retirement; and the "Moody's plus one" rate was phased in at 2% per month over a period of several months beginning with a rate of 10½% as of February 1981. (*Id.*)[6]

The Effect of the Changed Assumption on Lump-Sum Distributions

The yields on Moody's Aaa long-term corporate bonds rose steadily from 8.89% in October 1978, when the lump-sum option based on the 8½% assumption was first adopted, to 10.74% in December 1979. (Dk. No. 85, Exhibit C, at Exhibit

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T. F. Quinn, January 13, 1983, p. 34.) The delay in distribution, coupled with the requirement of election of the lump sum at least one year prior to retirement, meant that the earliest date on which a pilot could retire after learning of the change in assumption was February 1, 1981, too late to avoid the impact of the changed assumption.

[6] The "phase-in formula" in fact overtook the "Moody's plus one" rate in May, 1981 (Dk. No. 85, Ex. C). Thus the new interest assumption was fully effective for participants retiring on and after May 1, 1981.

II thereto.) Between February 1981 and October 1982, when petitioners were retiring, the Moody's rate ranged from a low of 12.12% to a high of 15.49% and thus produced lump-sum discount rates peaking at 16.49% for participants who retired on December 1, 1981. (*Id.*)

As a result, petitioners and other participants retiring in 1981 and 1982 who elected lump-sum payments received significantly smaller amounts under the new variable interest assumption than they would have received under the 8½% rate. (Dk. No. 69, Exhibit A.)

The Relationship Between the Interest Assumption and Plan Financing

The Plan is financed exclusively by contributions of American as the sponsoring employer. (Dk. No. 67, Exhibit A, § 51, pp. A13-14.) Each year, American makes a contribution to the Plan in an amount, determined by the Plan actuary in accordance with the actuarial cost method used by the Plan,[7] which, together with past and future contributions and investment earnings on all contributions, will be sufficient to pay the expenses of administering the Plan and to accumulate sufficient funds over the working lives of the participating employees to pay them their promised pension benefit when they reach retirement age. In computing the employer's annual contribution, the Plan actuary therefore must take into account, among other things, anticipated investment earnings and the amount of the contribution thus depends, in part, upon the rate of investment return the actuary assumes the Plan will realize. The actuarial assumption—the interest assumption for funding purposes—was 8½% prior to 1981; when the 1981 actuarial valuation was made in May of 1982, the interest assumption for funding purposes for active employees was increased to 9½%.

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[7] The manner of computing American's annual contribution is described in detail in the Affidavit of Carl H. Fischer, petitioners' expert. (Dk. No. 106.)

The interest and other actuarial assumptions utilized by the actuary in computing the employer's contributions represent only the actuary's best estimate of future experience. (Dk. No. 106, pp. 17-18.) In practice, the Plan's actual experience may—and usually will—vary to a greater or lesser extent. (*Id.*) When the Plan's actual investment experience in any plan year is more favorable than the actuarial assumption, an "actuarial experience gain" occurs, measured by the difference between the actual rate of return experienced by the Plan and the rate of return the actuary assumed. (*Id.*) This gain is amortized and applied by the actuary in computing contributions for future plan years. (*Id.*) When Plan assets earn more than the interest assumption for funding purposes, thereby producing an actuarial experience gain, the employer's contributions will be less, all other things being equal, than would otherwise be the case; the amount of the excess earnings are effectively passed through to the employer and ultimately completely appropriated by it, in the form of savings on future contributions. (*Id.*) The pass through would be accomplished in approximately 11.4 years under the actuarial cost method being used by American in 1981, and in 15 years under the cost method adopted in 1982. (*Id.*, pp. 18-19, 21, 22.)

The effect of paying a lump-sum distribution computed on the basis of an interest assumption in excess of the interest assumption used for funding purposes—as was the case with the lump-sum distributions to petitioners under the variable interest assumption—is exactly the same as an actuarial gain from investment experience, and the economic benefit of that gain is passed through to American in precisely the same way, over a period of 15 years under American's current actuarial cost method (*Id.*, pp. 24-26).[8]

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[8] Both Kenneth E. Polk, the consulting actuary serving as Plan actuary at the time of the change in interest assumption, and Willard A. Hartman, respondents' actuarial expert, agree that the effect of paying lump sum distributions discounted at rates in excess of the interest rate used for funding purposes is

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REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit Decided Important Questions of Federal Law Which Must Be Settled In Order to Insure the Enforceability of Basic Rights Under ERISA

Count I of the complaint alleged that American's change in actuarial assumptions used to calculate the present value of the lump-sum retirement benefit from an 8½% to a floating rate constitutes a reduction in participants' accrued benefits by an amendment to the plan, in violation of Section 204(g) of ERISA, 29 U.S.C. § 1054(g). Section 204(g) provides, with exceptions not relevant here, that a participant's accrued benefit[9] under a plan may not be decreased by a plan amendment.

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the same as an experience gain on investments and that that gain is passed through to American in the form of reduced future contributions (Deposition of Ken E. Polk, January 12, 1983, pp. 137-14; Dk. No. 117, Exhibit X, 43-47).

[9]The Pilots' "accrued benefits" include the lump-sum optional form of their normal retirement benefit. Treasury Regulation § 1.411(a)-7(a)(1) explicitly states that "[t]he accrued benefit includes any optional settlement at normal retirement age", and Treasury Regulation 1.411(d)-(3)(b) makes clear that plan amendments altering actuarial assumptions violate Section 411(d)(6) of the Internal Revenue Code (the Code analog to ERISA Section 204(g)) if they result in reduction of participants' accrued benefits so defined. These regulations are authoritative with respect to interpretation of Section 204 of ERISA (*see*, ERISA § 3002(c), 29 U.S.C. § 1202(c)) and, being legislative in character and not obviously repugnant to the statutory purpose, are binding on the courts. *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977); *Baker v. Otis Elevator Co.*, 609 F.2d 686 (3d Cir. 1979); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981). In similar circumstances, the Second Circuit has held that early retirement benefits are part of the accrued benefit. *Amato v. Western Union International, Inc.*, 773 F.2d

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The court of appeals held that there was no violation of Section 204(g) because the plan expressly authorized American to establish and alter the actuarial assumptions used to determine the equivalence of optional forms of benefit and,

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1402 (2d Cir. 1985) *cert. dismissed* 106 S. Ct. 1167 (1986); *but, cf. Bencivenga v. Western Pennsylvania Teamsters & Employers Pension Fund*, 763 F.2d 574 (3d Cir. 1985). Moreover, in the Retirement Equity Act of 1984 ("REA"), Pub. L. 98-397, Congress clarified the law to eliminate any doubt that optional forms of the normal retirement benefit are part of the accrued benefit protected from reduction by ERISA Section 204(g). Section 301(a)(2) of the REA amended Section 204(g) of ERISA to provide expressly that, for purposes of the prohibition against reductions in accrued benefits, "a plan amendment which has the effect of . . . eliminating an optional form of benefit, with respect to benefits accrued before the amendment, shall be treated as reducing accrued benefits". Thus, there can be no doubt subsequent to REA that a plan participant's "accrued benefit" for purposes of Section 204(g) includes optional forms. The Senate Finance Committee Report on REA is at pains to state that the modification to Section 204(g) of ERISA merely "clarifies" the scope of the prohibition and that "[t]he committee intends that no inference is to be made on the basis of this clarification as to the scope of the prohibition before the effective date of the provision". Senate Report No. 575, 98th Cong., 2d Sess., pp. 27-28, *reprinted in* [1984] *U.S. Code Cong. & Adm. News*, pp. 2573-74. Under familiar canons of statutory construction, the statement in the Committee Report negating inferences must be taken as buttressing the Congressional intention to clarify existing law rather than to change it. Under those circumstances, the language of the clarifying statute "is persuasive authority of the proper construction of the original [act]". *Brown v. Marquette Savings and Loan Ass'n*, 686 F.2d 608, 614-15 (7th Cir. 1982).

Petitioner's argument is that the increase in the interest assumption resulted in a reduced payment with respect to the portion of a participant's benefit earned *before* the change in assumption. As such it is an impermissible reduction in the accrued benefits of affected participants.

therefore, the change did not constitute a plan amendment. In so holding the court stated that it did not reach the question "whether the actuarial assumptions—contained, as they were, in bulletins which were physically distinct from the pension plan document—can be construed as part of the pension plan for purposes of ERISA."

Underlying the court of appeals' decision are two premises, both of which raise important questions as to the proper interpretation of ERISA. The first premise, more or less expressly stated by the court, is that the requirement of ERISA Section 402(b)(4) that every plan must specify the basis of benefit payments can be satisfied by a provision which permits the employer to determine the basis of such payments in its discretion. The court expressly rejected petitioners' argument that the purpose of that section, properly construed in the larger context of the statutory objectives of ERISA, is to make the rights and entitlements of plan participants objectively determinable and to preclude the intervention of employer discretion—a purpose directly analogous to the requirement under Treasury Regulation 1.401-1(b)(1)(i) that a pension plan must provide "definitely determinable benefits" in order to be a qualified plan under Section 401(a) of the Internal Revenue Code. The Internal Revenue Service has construed its "definitely determinable benefits" rule to mean that benefit levels may not be subject to employer discretion (*see*, Rev. Rul. 74-385, 1974-2 C.B. 130), and that the actuarial assumptions used to determine equivalence of optional forms of the normal retirement benefit must be set forth in the formal plan document (Rev. Rul. 79-90, 1979-1 C.B. 155).

The second, entirely unstated premise of the Seventh Circuit's decision is that the rules adopted by an employer pursuant to such a discretionary provision do not themselves become part of the "plan" for ERISA purposes so that when, by a later exercise of its discretion, the employer changes those rules there is no "amendment" to the "plan" which would call into play the safeguards of Section 204(g).

According to the court of appeals, it would "contort the plain meaning of 'amendment'" to apply that term to changes resulting from "the valid exercise of a provision which was already firmly ensconced in the pension document." Slip. Op. at 9, *infra* A-9. In short, the court below construed Section 204(g)'s proscription against reductions in accrued benefits "by an *amendment of the plan*" to reach only those reductions resulting from changes in the "pension document," adopted, presumably, in accordance with the formal amendment procedure provided in that document. Thus, notwithstanding the court's disclaimer, it necessarily decided that rules dehors the formal plan document, such as the actuarial assumptions here at issue, are not part of the "plan" for purposes of Section 204(g), even though those rules determine "the basis of payments . . . from the plan" and are therefore required by Section 402(b)(4) to be "specif[ied]" by the "plan."

The court of appeals' interpretation of the ERISA Section 402(b)(4) requirement that the plan must specify the basis on which payments are made as permitting employer discretion, and its implicit restrictive interpretation of the meaning of the term "plan" are at odds with the language and purpose of the statute, conflict with decisions of other circuits which have interpreted the term "plan" in ERISA, and, if allowed to stand, will seriously weaken protections ERISA was enacted to provide.

A. Whether a provision authorizing an employer, in its discretion, to establish and alter rules determining the amount of participants' benefit entitlements, satisfies the requirement of ERISA § 402(b)(4) that a plan must specify the basis for benefit payments.

As made clear in Section 2 of ERISA, 29 U.S.C. § 1001, ERISA was born of a Congressional determination that comprehensive legislative action was required in order to protect employees from loss of anticipated retirement benefits. Among the measures adopted by Congress for accomplishing that overriding purpose were extensive provisions designed

to insure full disclosure to plan participants of their rights and obligations under the plan, as well as substantive provisions designed to safeguard employee benefit entitlements from inequitable loss or reduction. Section 402(b)(4) is clearly designed to provide both forms of protection.

The Conference Committee, in its Report on the bill which was ultimately enacted, explained the purpose of Section 402:

> A written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan . . .
>
> . . . [T]he plan documents are to set out the basis for contributions to and payments from the plan. Thus, the plan is to specify what part (if any) of contributions are to come from employees and what part from employers. Also, it is to specify the basis on which payments are to be made to participants and beneficiaries. (H. Conf. Rep. No. 93-1280, 93d Cong. 2d Sess. 297, *reprinted in* [1974] U.S. Code Cong. & Adm. News 5023, 5077.)

In addition to this clearly-intended disclosure function, it is also apparent that the requirement that the plan specify the basis of benefit payments, coupled with the provision of Section 404(a)(1)(D) of ERISA requiring plan fiduciaries to discharge their duties in accordance with "the documents and instruments governing the plan" and Section 204(g)'s prohibition of plan amendments which have the effect of reducing accrued benefits, also provides a significant substantive safeguard for plan participants. It is equally apparent that a plan provision which "specifies" that the basis of benefit payments is to be determined, in whole or in part, by the employer in its discretion defeats both the disclosure and the protective purposes of Section 402.

Moreover, the holding of the court below creates a distinction between pension plans qualified under Section 401(a) of the Internal Revenue Code and nonqualified plans on this

critical point. Here the court of appeals has said that Section 402(b)(4) of ERISA—which applies to all plans, qualified and nonqualified—is not offended by a provision permitting employer discretion. Such a provision, however, is clearly not permissible under Section 401(a) of the Code. For many years prior to enactment of ERISA, regulations under Section 401(a) had defined a qualified pension plan as a "definite written program and arrangement" which is "established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement." Treas. Reg. §§ 1.401-1(a)(2), 1.401-1(b)(1)(i); *Guides for Qualification of Pension, Profit Sharing and Stock Bonus Plans*, IRS Pub. 778, Part 2, ¶¶ (f), (m), *reprinted in* CCH Pen. Plan Guide ¶ 17,003. The purpose of the definitely determinable benefits requirement is to insure that the amount of benefits "is not subject to the discretion of the employer." Rev. Rul. 74-385, 1974-2 C.B. 130.

The effectiveness of these regulations has continued since enactment of ERISA (*see*, Treas. Regs. § 1.401(a)-1(b)) and the IRS has since had occasion to consider its "definitely determinable benefits" requirement in the context of actuarially equivalent optional forms of benefit:

> *Whenever the amount of a benefit in a defined benefit plan is to be determined by some procedure (such as "actuarial equivalent", "actuarial reserve", or "actuarial reduction") which requires the use of actuarial assumptions (interest, mortality, etc.) the assumptions to be used must be specified within the plan in a manner which precludes employer discretion.* For purposes of this revenue ruling, employer discretion includes discretion of the employer, plan administrator, fiduciary, actuary, etc. (Rev. Rul. 79-90, 1979-1 C.B. 155, 156.) (Emphasis added.)

Revenue ruling 79-90 goes on to state that plans may comply either by incorporating a fixed standard using specified assumptions or a table of adjustment factors, or by adopting a variable standard which indexes the assumption to some

objective, self-adjusting standard such as the prime rate of interest.[10] In Revenue Ruling 81-12, 1981-1 C.B. 228, the IRS further held that changes in actuarial assumptions may result in impermissible reductions in participants' accrued benefits and illustrated techniques for changing the assumptions while safeguarding benefits from being unlawfully reduced.

Thus, the IRS clearly interprets its "definitely determinable benefits" rules as necessitating the specification in the formal plan document of the actuarial assumptions used to determine equivalence of optional forms of benefit, in a manner which precludes employer discretion. That requirement, as a practical matter, will now have to be met by all defined benefit pension plans as a condition of qualification

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[10] Revenue Ruling 79-90 deferred its effectiveness for noncomplying plans in existence on the date of its issuance—such as the American plan—until plan years beginning on or after December 31, 1983. Because of this "grace period" for compliance, the court of appeals "[saw] no reason to immediately impose upon American a provision with which it was given years to comply." Slip Op. at 11, *infra* A-11. The court below did not separately analyze the meaning of Section 402(b)(4) of ERISA, or attempt to interpret that Section in light of its purpose or the overriding purposes of Title I of ERISA. Instead it focused upon a narrow and technical interpretation of the meaning of the term "amendment" without regard to the statutory objectives, placing entire reliance upon an inapposite case arising under Section 203(a)(3)(E) of ERISA, 29 U.S.C. § 1053(a)(3)(E), a specialized provision applicable only to multiemployer pension plans and not to single-employer plans like American's. See discussion of *Stewart v. National Shopmen's Pension Fund*, 730 F.2d 1552 (D.C. Cir. 1984), at pp. 25-27, *infra*. The effect of the court of appeals' decision is to postpone the effectiveness of the substantive provisions embodied in ERISA Section 402(b)(4), on the basis of an IRS determination to defer effectiveness of a ruling under Section 401(a) of the Internal Revenue Code, a result which raises a separate question for review. See, *infra*, pp. 21-23.

for tax purposes;[11] but, under the Seventh Circuit ruling in this case, there is nothing which would prevent defined contribution pension plans, nonqualified defined benefit plans or employee welfare benefit plans from leaving the basis of benefit payments to the discretion of the employer.[12]

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[11] The IRS position has been effectively espoused by Congress in the Retirement Equity Act of 1984, Pub. L. 98-397, which added a new paragraph (25) to Section 401(a) of the Internal Revenue Code, expressly requiring that, in order to be a qualified plan, the actuarial assumptions utilized by a defined benefit plan must be "specified in the plan in a way which precludes employer discretion," 26 U.S.C. § 401(a)(25), as amended.

[12] While the issue in this case arises in the specific context of changes in actuarial assumptions, the potential for disruption of the statutory system of protections if Section 402(b)(4) is interpreted as tolerating employer discretion goes far beyond that limited context. For example, under the court of appeals' ruling, a plan which provides a defined benefit in accordance with a benefit formula based on years of participation in the plan could provide that the employer shall, from time to time, determine the definition of a "year of participation", subject only to the provisos that the definition must be reasonable and consistently applied to all participants, and that some credit must be given for each year in which the participant has at least 1000 hours of service. The provisos are the only limitations imposed on employer discretion by Section 204(b)(3) of ERISA and regulations thereunder. Pursuant to such a plan provision, an employer could, after a number of years of crediting employees with a full year of participation for each 1000-hour year, elect to redefine "year of participation" to require 2000 hours of service for a full year's credit, giving employees with more than 1000 hours of service but less than 2000 a partial year's credit on a pro-rata basis. The new definition is one which is specifically stated to be "reasonable and consistent" in Department of Labor Regulations § 2530.204-2(c)(4)(i), 29 C.F.R. § 2530.204(c)(4)(i). Under the ruling of the court below, there would be no violation of Sections 204(g) or 402(b)(4) of ERISA, even though the redefinition would dramatically and retroactively reduce the benefit entitlements already accrued of employees unable to meet the new 2000-hour test.

B. Whether the term "plan" in ERISA must be construed broadly to include all rules which determine participants' benefits, even if those rules are established by a legally permissible exercise of employer discretion and even if the rules are omitted from the formal plan document.

Setting aside for the moment the question of whether Section 402(b)(4) of ERISA requires the inclusion of the actuarial assumptions in the formal plan document in a manner precluding employer discretion, the issue in this case is *whether, for purposes of Section 204(g), the Plan includes rules which are not contained in the formal plan document*, so that a change in those rules constitutes a "plan amendment" subject to Section 204(g). The issue is not, as the court of appeals apparently thought, what the term "amendment" means. The issue is whether the interest rate changed by American was part of the Plan.

The court of appeals' approach is wholly inappropriate for broad remedial legislation such as ERISA.[13] The court construed the term "plan" narrowly, even though a broad interpretation is required by familiar principles of construction applicable to remedial statutes. A liberal interpretation of the term "Plan" to include all the rules, regulations and

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[13] ERISA is a comprehensive remedial statute designed to protect plan participants. *See, e.g., Duchow v. New York State Teamsters Conference Pension & Retirement Fund*, 691 F.2d 74, 76 (2d Cir. 1982), *cert. denied*, 461 U.S. 918 (1983). Remedial legislation is to be liberally and broadly construed to effectuate the evident purpose of the statute, *Tcherepin v. Knight*, 389 U.S. 332, 336, 19 L.Ed.2d 564, 569 (1967), in favor of those intended to be benefitted, *Wirtz v. Titi Peat Humus Co.*, 373 F.2d 209 (4th Cir.), *cert. denied*, 389 U.S. 834 (1967), and in a manner tending to discourage attempted evasion by wrongdoers, *Westinghouse Electric Corp. v. Pacific Gas & Electric Co.*, 326 F.2d 575, 580 (9th Cir. 1964). Exceptions are to be narrowly construed and the burden of establishing an exception is on the party claiming it. *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 232 (5th Cir. 1969).

provisions having a material impact upon the determination of participants' rights and benefit entitlements, whether written or unwritten or found in the formal plan document or in some other document, is consistent with the statutory purpose. The narrow interpretation of the court below facilitates evasion of essential statutory safeguards.

In light of the purpose of ERISA to protect pension benefits from loss or reduction at the employer's discretion, these familiar principles militate against acceptance of a narrow interpretation of the term "plan". Under the court of appeals' interpretation, American was able to reduce petitioners' "accrued benefits" solely *because* it did not include the actuarial assumptions in the formal Plan document.

Under § 3(2) of ERISA, the term "plan" includes all rules affecting the rights and benefits of participants, whether written or unwritten. That Section defines the term pension plan as

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . .

The definition thus includes *any* plan, fund or program, not merely any *written* plan, fund or program as the court of appeals would have it. Indeed, the definition expressly authorizes reference to "surrounding circumstances" in ascertaining the content of a plan. If it were true that "plan" means only the written instrument, as American contended, Section 402(a), which requires that every *plan* be maintained "pursuant to a *written instrument*", becomes redundant.[14]

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[14] Of course, failure to reduce the salient features of the plan to writing—even if American and the court of appeals were

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If the term "plan" were confined to those provisions which the sponsoring employer sees fit to include in the formal plan document, a fair reading of Section 402 would compel the conclusion that the actuarial assumptions *must* be included in it. Section 402(b)(4) requires that the "plan" specify the basis on which payments are to be made from the plan. The basis for optional forms of benefit payments is, in addition to the normal benefit formula based on years of service and compensation, the actuarial mortality and interest assumptions used to determine equivalence (Dk. No. 196, ¶ 5(a)). Having in mind the purpose of Section 402 (*See, supra* p. 14), to assure that plan participants be provided a written document containing all the information they require to determine their rights, inclusion of actuarial assumptions is clearly essential. Without those assumptions, *it is impossible for a participant to determine,* even with the assistance of a professional, *the amount of his benefit entitlement under any optional form.*

Despite the court's disclaimer, the only possible reading of the decision below is that "plan" means "formal plan document". Aside from being erroneous, such a conclusion has ramifications which undercut the basic protections ERISA was intended to provide. If the court had properly interpreted "plan" to include all rules affecting the rights and

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entirely correct that "plan" means only "written plan" and that Section 402(a) of ERISA is a mere tautology—would bring into play the final sentence of ERISA Section 3(2)(a) which provides:

> In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such payment or arrangement shall be treated as a pension plan.

Furthermore, there are repeated references in the statute which assume that a "plan" may comprise a multiplicity of documents. *E.g.*, ERISA Sections 104(b)(2), 404(a)(1)(D), 29 U.S.C. §§ 1024(b)(2). 1104(a)(1)(D).

entitlements of participants, whether or not contained in the formal plan document, then the discount interest assumption used to calculate the lump-sum option, which was not contained in the formal Plan document, would have had to be viewed as part of the Plan. Since the assumed interest was changed from a fixed to a variable rate, that change in the *basis* of making payments from the Plan should have been found to require a plan amendment.

Petitioners do not ask that this Court close the historical loophole which the court below apparently thought existed (but which did not exist in fact); Congress has done that by *clarifying* the law in the Retirement Equity Act of 1984. *See supra* notes 9 and 11. Rather petitioners ask this Court to decide the meaning of a basic concept embodied in ERISA and to assure the effectiveness of ERISA's protections. Absent action by this Court correcting the Seventh Circuit's narrow, grudging and erroneous interpretation of the term "plan", employers may be able to contrive other imaginative ways to circumvent ERISA's substantive requirements.

C. Whether the IRS, in exercising its authority to delay the effectiveness of tax provisions in order to preserve an employer's tax deduction can relieve the employer of the duty to comply with parallel pre-existing substantive provisions of ERISA.

The fact that in 1979 the IRS gave existing pension plans until 1984 to comply with the requirement under the Internal Revenue Code that actuarial assumptions be included in the formal Plan document served only to preserve defendant American's tax deductions under Section 404 of the Internal Revenue Code; it did not—*and could not*—create a loophole relieving American of its fiduciary obligations to Petitioners and other Plan participants under the substantive provisions of Title I of ERISA.

The principal justification advanced by the court of appeals for not requiring the actuarial assumptions to be

included in the formal Plan document and for not considering them to be part of the Plan is that, the Internal Revenue Service, in Revenue Ruling 79-90, 1979-1 C.B. 155, delayed the effectiveness of Section 1.401-1(b)(1)(i) of its Regulations, requiring that such assumptions be included in the written instrument embodying the plan, until 1984 for plans in existence on March 12, 1979. Thus, since the American Plan was in existence on that date, the court found that American was not required to incorporate the actuarial assumptions into the Plan document until 1984.

In its administration of the tax laws, the IRS has authority under Section 7805(b) of the Code to defer or postpone the effectiveness of any of its determinations or rulings, including rulings relating to the conditions of continued tax-qualified status of pension plans (Sections 401 and 411) and the deductibility of employer contributions to such plans (Section 404). *But the IRS has no authority* to suspend or delay the effectiveness of non-tax laws governing the duties of plan fiduciaries.

The effectiveness of Section 402 of ERISA is expressly provided in Section 414 of ERISA. Under the latter section, Part 4 of subtitle B of Title I of ERISA—which includes Section 402—became effective on January 1, 1975. The IRS has no authority to defer the effectiveness of Section 402; that authority is conferred instead upon the Secretary of Labor, and the Secretary's authority is limited to postponements not extending beyond January 1, 1976. Thus, Section 402 of ERISA became effective with respect to the Plan on January 1, 1976, at the very latest. Since Section 402 of ERISA, properly interpreted, requires inclusion of the actuarial assumptions in the written instrument pursuant to which the Plan is maintained, and since that requirement is independent of the similar requirement under Section 1.401(b)(1)(i) of the IRS Regulations, the IRS could not postpone the substantive requirements of Section 402. Accordingly, the "loophole" relied upon by American and sanctioned by the court of appeals simply does not exist.

While the postponed effectiveness of Revenue Ruling 79-90 preserved defendant American's tax deduction, it could not alter American's obligations to its employees.

Petitioners cited Revenue Ruling 79-90 because it embodied the authoritative IRS interpretation of the Code analog to ERISA § 402(b)(4). As such, the Ruling represents persuasive, albeit nonbinding, authority for the proper interpretation of the substantive ERISA provision. The court below, satisfied with its restrictive interpretation of the term "amendment" in Section 204(g), never even addressed the question of the proper interpretation of Section 402(b)(4), except to reject petitioner's proferred interpretation solely on the grounds that the IRS had deferred the effectiveness of Revenue Ruling 79-90. This case therefore presents important questions as to the proper interplay between IRS interpretations of Code provisions and regulations, and the construction of parallel substantive provisions of ERISA, as well as to the extent of the IRS' authority to postpone effectiveness of those substantive provisions.

II.

There Is A Conflict Among the Circuits Which Can Be Effectively Resolved Only By this Court

The narrow interpretation of "plan" by the Seventh Circuit conflicts with decisions of other courts of appeals which have considered the meaning of the term "plan" in Section 3 of ERISA. Those courts have concluded that a "plan" is not simply the formal plan document and that the term is not limited to the formal written instrument required by Section 402 of ERISA.

Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982), involved a multiple employer trust established to allow small employers to secure group health insurance coverage for their employees at rates more favorable than those directly available to individual employers. The Secretary of

Labor sued the trustees seeking to establish that they were fiduciaries subject to ERISA fiduciary standards; the defendant trustees responded with the contention that the arrangements in question involved "only the bare purchase of insurance" and were not employee benefit plans subject to ERISA. In reversing the district court's dismissal of the action for want of jurisdiction, the Eleventh Circuit, in a unanimous *en banc* decision, held that ERISA reaches any plan, whether or not there is a formal written instrument, that it is proper to infer essential provisions of the plan from sources outside the plan document, and that the failure of the responsible plan fiduciaries to comply with Section 402 of ERISA did not relieve them from their duties and obligations under Title I of ERISA. 688 F.2d at 1372-73. *Accord, Scott v. Gulf Oil Corporation*, 754 F.2d 1499, 1503-04 (9th Cir. 1985).

In *Dependahl v. Falstaff Brewing Corp.*, 491 F. Supp. 1188 (E.D. Mo. 1980), *aff'd in relevant part* 653 F. 2d 1208 (8th Cir.) *cert denied*, 454 U.S. 968 (1981), the issue was whether a split-dollar insurance program covering key executives was an employee benefit plan. The employer argued that the program did not constitute an employee benefit plan because there was no *single* written document embodying the program as required by Section 402(a). The court responded:

> Defendants miss the point. If the CBS Plan falls within ERISA, as this court concludes that it does, defendants may not avoid the requirements of the Act by merely failing to comply and then arguing that the Plan is not within the Act due to their noncompliance. 491 F.Supp. at 1195.

Both *Donovan* and *Dependahl* interpreted the ERISA Section 3(1) definition of "welfare benefit plan" rather than the Section 3(2) definition of "pension benefit plan" involved here. But the two types of plans are simply subcategories of "employee benefit plan" or "plan" and are distinguished only by the character of the benefits provided. Thus both *Donovan* and *Dependahl* stand for the proposition that the

term "plan" as defined in Section 3 of ERISA is not merely synonymous with the written instrument, if any, embodying the plan as required by Section 402(a). The *Donovan* and *Dependahl* courts reached their conclusions from the explicit words of the statute and from a conviction that any other construction would subvert the statutory purpose. Significantly, Section 204(g) deals with amendments to the "plan", not amendments to the "written instrument".[15]

The Seventh Circuit did not cite either *Donovan* or *Dependahl.* Instead it relied on an inapposite decision, *Stewart v. National Shopmen Pension Fund,* 730 F.2d 1552 (D.C. Cir. 1984), *cert. denied,* 105 S.Ct. 127 (1984), apparently for the proposition that an action taken by a plan administrator pursuant to an express delegation of discretionary authority under the formal plan document does not constitute an

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[15] It is interesting to note that, in H.R. 2, the version of the act as it passed the House of Representatives, Section 3(2) would have provided:

> The term "employee pension benefit plan" or "pension plan" means any plan, fund or program *which is communicated or its benefits described in writing to the employees, and* which was heretofore or hereafter established or maintained by an employer . . . (III *Legislative History of the Employee Retirement Income Security Act of 1974 Prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare,* 3904 (94th Con. 2d Sess. 1976)). (Emphasis added.)

And Section III(a)(1) of the House bill, the House version of the provision which ultimately became Section 402(a) of ERISA, read:

> Every employee benefit plan shall be established pursuant to a *written plan* . . . (*Id.* at 3947.)

Thus, the Act as it ultimately emerged from the Conference Committee purged all reference to any requirement of a writing from Section 3(2) and refined the language of Section 402(a) to maintain the distinction between a "plan" and the *"written instrument"* embodying it.

"amendment" of the plan. Since Section 402(b)(4) requires that the actuarial assumptions be stated in the plan document and not be left to the discretion of the plan administrator, the *Stewart* decision is simply irrelevant, even if the case actually stood for the principle claimed.

In *Stewart*, the plan in question, unlike the American Plan, was a multi-employer plan which contained a provision—*expressly authorized by Section 203(a)(3)(E) of ERISA in order to avoid "dumping" of unfunded liabilities on multi-employer plans by withdrawing employers*—which permitted the plan trustees to cancel participants' credits for services attributable to service prior to the date their particular employer joined the plan and began making contributions. In other words, when a new employer entered the plan, his employees were conditionally granted credit for pre-participation years of service in calculating their benefit entitlement, subject to cancellation if their employer later withdrew and stopped making contributions. When the *Stewart* plaintiffs' employer ceased making contributions, the trustees exercised their authority to cancel credits for pre-participation years of service.

The court held that this exercise of the trustees' authority did not entail any "amendment to the vesting schedule" subject to Section 203(c)(1)(A) since the plaintiffs retained an unqualified right to receive a benefit. The court also held that the action did not violate Section 204(g) since it did not have the effect of amending the plan. This latter ruling was clearly correct under the circumstances; the service credits in question had always been conditioned on the employer's continued contributions and since the interpretation sought by the *Stewart* plaintiffs would have effectively repealed Section 203(a)(3)(E). Not only were the cancellations specifically authorized by the statute, in consequence of Congressional recognition of the special problems of multi-employer pension plans,[16] but they were implemented by the trustees

[16] Section 203(a)(3)(E) was added to ERISA by Section 303 of the Multi-employer Pension Plan Amendments Act of 1980, Publ. L. 96-364. Among the findings leading to enactment of

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in specific, narrowly-delineated circumstances, affected only particular participants and, as the court held, were still subject to judicial scrutiny to assure that the action was not arbitrary or capricious in relation to the statutory purpose of permitting cancellation of pre-participation service by multi-employer plans. Such considerations are not applicable to single employer plans such as the American Plan.

Moreover, even ignoring the dangers of relying on decisions involving multi-employer plans in the single employer context, there is a qualitative difference between the action taken by the *Stewart* trustees and the conduct involved in this case. In the *Stewart* case, the plan expressly authorized cancellation of service credits in particular circumstances. The cancellation therefore did not alter the plan provisions (whether those provisions were contained in the formal document or otherwise), did not change the rates at which benefits accrued under the plan, and affected only the employees of the withdrawing employer. Here, the action of American changed the assumptions in a manner which affected every active participant and all past benefit accruals. In short, American changed a rule of general application under the Plan, whereas the *Stewart* trustees merely applied a pre-existing rule to the specific facts of the case before them. Whether the actuarial assumptions changed by the American administrator were or were not part of the Plan—the real issue in the present case—is something upon which the *Stewart* decision sheds no light.

Although it ignored *Donovan* and *Dependahl*, the court's decision is in conflict with them.

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that Act was the determination of Congress that "withdrawals of continuing employers from a multi-employer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor relations." (P.L. 96-364, § 3(a)(4)(A)).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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November 1, 1986

APPENDIX A
(Opinions and Judgments Below)

In the
United States Court of Appeals
For the Seventh Circuit

No. 85-1830

ROY E. DOOLEY, JR., et al.,

Plaintiffs-Appellants,

v.

AMERICAN AIRLINES, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 81 C 6770—**James B. Parsons**, *Judge.*

ARGUED FEBRUARY 27, 1986—DECIDED AUGUST 5, 1986

Before WOOD, JR., FLAUM and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* The appellants, retired pilots of American Airlines, brought this four count complaint pursuant to the Employee Retirement Income Security Act (ERISA). They sought to enforce their rights under an American Airlines defined benefit pension plan. The district court, on cross-motions for summary judgment, held that the alleged ERISA violations were unfounded. Accordingly, the court entered judgment in favor of the appellees on all four counts. While we agree with the district court's disposition of Count I, we disagree with its disposition of Counts II through IV. Therefore, we affirm the district court's judgment in part, and we reverse that judgment in part and remand this case for further proceedings.

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I

This is an action brought under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a), to recover benefits and enforce rights under the terms of the American Airlines, Inc. Fixed Income Plan of the Pilot Retirement Income Program (Plan). The plaintiffs-appellants are fifty-eight retired pilot employees for American Airlines (Pilots). The defendants, all of whom are sued in their capacity as ERISA-defined fiduciaries, include 1) American Airlines, Inc., 2) the Plan, and 3) five individual members of American's Pension Benefits Administration Committee (collectively American).

The Plan is a "defined benefit pension plan" which provides that, upon retirement at age 60, a pilot employee is entitled to receive a Basic Retirement Annuity consisting of a monthly pension equal to 1.25% of the employee's final average compensation multiplied by a number equal to one less than the number of years of the employee's credited service. Reduced to its essentials, this means that an employee is entitled to receive a monthly annuity-like payment from the Plan. However, at the time of this litigation, a pilot employee was not *required* to receive his retirement in the usual annuity form. Instead, pilot employees were also entitled, pursuant to section 10.4 of the Plan, to select payment in one of a number of optional forms. This litigation focuses on the Plan's administration of only one of section 10.4's optional payment plans.

In this case, the Pilots chose to receive their retirement benefits in the form of a lump-sum payment. While that option was not specifically provided for in the actual plan document, payments in that form were nonetheless authorized by the document. Section 10.4(c) of the Plan provided:

> (c) *Open Option.* A member may elect, if the Administrator consents thereto on the basis of policies uniformly applicable to all Members similarly situated, to receive his or her Basic Retirement Annuity . . . in an optional form other than one specifically provided in this Section. . . .

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Appellants' Br. at 6. Pursuant to this section, American Airlines issued Bulletin No. 547-78 on October 26, 1978. That Bulletin provided that American Airlines:

> and the Allied Pilots Association have agreed to allow lump-sum distributions at retirement from the Pilot Retirement Benefit Plan. This form of payment would be granted under the Open Option and is offered in addition to the various forms of payment currently provided under the Plan.

R.85, Ex. B. The Bulletin continued by explaining a number of preconditions to an employee's acceptance of payments under the lump-sum option. Furthermore, and more importantly for our purposes, the Bulletin also specifically stated that:

> Distributions will be based on the annual benefit otherwise provided under the Plan multiplied by a lump-sum annuity factor. The factor is developed using an 8½% interest rate and the 1971 Group Annuity Mortality Table.

Id. Thus, at its inception, the lump-sum option had a stated 8½% fixed actuarial assumption. That assumption was used to discount to present value the total amount of payments that an employee would have otherwise received if he had selected the annuity option.

The fixed-rate actuarial assumption remained in effect for slightly more than one year. Then, on December 26, 1979, American Airlines issued Bulletin No. 497-79 which discontinued the fixed rate and, instead, adopted a floating actuarial assumption computed as 1% greater than the Moody's AAA Corporate Bond Rate for the second month preceding the employee's retirement date.[1] R.85, Ex. D. According to the Bulletin, "[t]he purpose of this revision

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[1] This change came just ten months after the Internal Revenue Service issued Rev. Rul. 79-90, 1979-1 C.B. 156. That Ruling informed pension plans that their actuarial assumptions must be specified in the plan itself.

[was] to conform such interest rate to currently prevailing interest rates and to the Company's expectation for return on investment of pension assets for the intermediate term, that is, the term over which the series of payments would be made." *Id.* Shortly thereafter, this new policy was slightly modified. In Bulletin No. 161-80, issued on April 22, 1980, American Airlines 1) altered some of the preconditions for lump-sum payment, 2) changed the relevant Moody's AAA Corporate Bond Rate from the second to the third month preceding the employee's retirement, and 3) initiated a policy of "phasing in" the new floating rate by upwardly adjusting the 8½% fixed rate by 2% each month until it overtook the "Moody's + 1" rate. R.85, Ex. E.

The dispute in this case centers on American Airlines' change in the actuarial assumption from the 8½% fixed rate to the "Moody's + 1" floating rate. According to the Pilots, between February 1981 and October 1982 the relevant Moody's rate ranged from a low of 12.12% to a high of 15.49%; therefore, the "Moody's + 1" rate peaked at a high of 16.49%. Appellants' Br. at 8. Because of this shift in interest rate, retirees during this period received a much smaller lump-sum payment than those individuals who retired while the 8½% fixed rate was still in effect. As a result, the Pilots brought this four count action in the district court. Count I asserts that American's change to the floating interest assumption constituted an amendment to the Plan which resulted in a reduction of accrued benefits in violation of ERISA § 204(g), 29 U.S.C. § 1054 (g).[2] Count II asserts, in the alternative, that the floating interest rate was unreasonably high during the relevant time period and, therefore, resulted in lump-sum benefits which were less than actuarially equivalent to the normal retirement annuity. This deficiency, according to the

[2] ERISA § 204(g), 29 U.S.C. § 1054(g), then provided:

> The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title.

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appellants, created a violation of the vesting provisions of ERISA § 203, 29 U.S.C. § 1053.[3] Count III is premised on the theory that 1) increases in the interest assumption lead to reductions in lump-sum benefits, and 2) reductions in lump-sum benefits lead to substantially smaller contributions to the Plan on the part of the employer, American Airlines. Given these linkages, Count III alleges that the change in the actuarial interest rate assumption was motivated by the Plan fiduciaries' desire to benefit economically American Airlines in violation of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A),[4] which requires fiduciaries to discharge their duties solely in the interest of the Plan's participants and beneficiaries. Finally, Count IV seeks injunctive relief to prevent the continuation of the activities alleged in the previous three counts.

The district court, ruling on the Pilots' motion for summary judgment on Count I and American's cross-motion for summary judgment on Counts I through IV, found in favor of the defendants. The district court held that:

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[3] ERISA § 203, 29 U.S.C. § 1053, provides, in part:

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.
>
> (1) A plan satisfies the requirments of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

[4] ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), provides:

> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan.

> The Plan in question specifically provides that any alternative form of payment must be "actuarially equivalent" to a retiree's Basic Retirement annuity. "Actuarially equivalent" is defined in the Plan as "the equivalent in value on the basis of actuarial factors approved from time to time by American Airlines."
>
> * * *
>
> [Therefore, the] defendants' change in the discount interest rate did not constitute a "plan amendment" under ERISA and did not cause an unlawful reduction in plaintiffs' retirement benefits.

Dooley v. American Airlines, Inc., No. 81 C 6770, slip op. at 5-6 (N.D. Ill. Apr. 17, 1985) [hereinafter Order]. Relying on this basis, the district court found for the defendants on Count I. The court continued by stating:

> The Plan required that the lump sum payment be actuarially equivalent to the retirees' Basic Retirement annuity. The defendants' action served to insure actuarial equivalence. Accordingly, the defendants are not guilty of violating their fiduciary duties. Rather, I find that the defendants exercised good judgment in instituting the variable rate which will provide actuarial equivalence between available options.

Id. at 6. Based on these findings, the district court also found for American on Counts II and III. Additionally, since Count IV was derivative of the other three counts, and since the other three had been resolved in favor of American, the district court found in favor of American on Count IV. This appeal followed.

II

A. COUNT I

Count I deals with the alleged violation of ERISA § 204(g), 29 U.S.C. § 1054(g).[5] That statute provides, in pertinent

[5] In 1984, section 204(g) was amended by adding the following language:

(Footnote continued on following page)

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part, that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan. . . ." Thus, the essential elements of a section 204(g) violation are: 1) a plan amendment, and 2) a reduction in accrued benefits. Since we agree with American that no plan amendment occurred in this case, we need not reach—and voice no opinion concerning—whether, if there were a plan amendment in this case, it would have served to reduce an employee's accrued benefits.

American contends that, assuming that the actuarial assumptions in this case can be construed as part of the employee benefit plan,[6] there was no ERISA § 204(g) violation because there was no plan amendment. To support this position, American first refers this court to the ac-

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[5] *continued*

> For purposes of [the preceding] paragraph . . ., a plan amendment which has the effect of—
>
> (A) eliminating or reducing an *early retirement benefit* or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an *optional* form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

29 U.S.C. § 1054(g) (emphasis added). This amendment became effective for plan years beginning after December 31, 1984—well after the relevant time period in this case. Therefore, the amendment has no direct relationship on the result of our case.

[6] The parties have briefed and argued whether the actuarial assumptions—contained, as they were, in bulletins which were physically distinct from the pension plan document—can be construed as part of the pension plan for purposes of ERISA. Because of our disposition of this case, we need not reach that question.

tual pension document. Section 10.4 of the plan—the section under which the lump-sum payment was authorized—stated: "Any optional form of Basic Retirement Annuity elected pursuant to this Section shall be the Actuarial Equivalent of an annuity payable for the lifetime of the Member only in an annual amount equal to such Basic Retirement Annuity. . . ." Thus, section 10.4 can be fairly read as imposing a requirement that all optional forms of pension payments must be actuarially equivalent to the standard annuity form of payment. Additionally, Article II of the pension document (the article which defines the terms which will be used throughout the document) defines "actuarial equivalent" as "the equivalent in value on the basis of actuarial factors *approved from time to time by American Airlines*. . . ." Article II, § (d) (emphasis added). Therefore, by putting both of these provisions together, American contends that the pension plan administrators—by changing the actuarial assumption from the 8½% fixed rate to the "Moody's + 1" floating rate—were merely exercising a provision *which was already in the pension plan*. Accordingly, there could be no "plan amendment" because the administrators were merely carrying-out the provisions of the plan as it then stood.

American has supplied case law support for its position. In *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552 (D.C. Cir. 1984), the District of Columbia Circuit discussed the appropriate meaning of "plan amendment." Dealing with ERISA §§ 203(c)(1)(B) and 204(g), the court noted that:

> In both sections, the word "amendment" is used as a word of limitation. Congress did *not* state that any change would trigger the two provisions; it stated that any change *by amendment* would do so. The district court found, and the plaintiffs admit, that there was no "amendment" to the plan in the "technical" sense—*i.e.*, an actual change in the provisions of the plan. True. All that happened was that § 2.09, a provision already incorporated into the plan, was *applied*. Actions authorized by the plan were carried out by the persons authorized to do so.

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730 F.2d at 1561 (emphasis in original). In *Stewart*, the court was faced with a multi-employer pension fund. That pension fund specifically provided that if an employer's participation in the fund should terminate, the fund's trustees were empowered to cancel any portion of an employee's pension which was based on the employee's service with that particular employer prior to the time that the employer joined the multi-employer fund.[7] While the *Stewart* decision is factually distinguishable from the present case, its commonsensical rule of law is nonetheless applicable here. In the context of this particular pension plan, the plan fiduciaries had the authority to change the actuarial assumptions "from time to time" in an effort to maintain actuarial equivalence. That is precisely what they did in this case. Therefore, we are unwilling to contort the plain meaning of "amendment" so that it includes the valid exercise of a provision which was already firmly ensconced in the pension document.

In rebuttal, the Pilots argue that the Plan, by allowing this type of employer discretion in the setting of actuarial assumptions, was violative of ERISA. Therefore, they contend that we should disregard the Plan's discretionary provision as a matter of public policy. In this respect, the Pilots place their primary reliance on ERISA § 402(b)(4), 29 U.S.C. § 1102(b)(4), and Internal Revenue Code § 401 (IRC § 401), 26 U.S.C. § 401.

ERISA § 402(b)(4) provides that: "Every employee benefit plan shall—(4) specify the basis on which payments are made to and from the plan." Similarly, Treasury Regulation 1.401-1(b)(1)(i) requires that, for a plan to be qualified

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[7] Notably, such a provision is both contemplated by and specifically approved of in ERISA. *See* ERISA § 203(a)(3)(E), 29 U.S.C. § 1053(a)(3)(E). The *Stewart* court recognized this point when it stated: "To give trustees the flexibility necessary for efficient operation of pension funds, Congress has recognized and provided for several situations in which plans can reduce or eliminate benefits to participants by implementing preexisting plan provisions." 730 F.2d at 1563 (footnote omitted).

under IRC § 401, the plan must provide for "definitely determinable benefits." This latter requirement is met when the level of employee benefits is computed via a fixed formula and "*is not within the discretion of the employer.*" *See* Rev. Rul. 74-385, 1974-2 C.B. 130. Accordingly, since IRC § 401's "definitely determinable benefits" requirement is, in some respects, parallel to the ERISA § 402(b)(4) requirement (plan must specify the basis upon which payments are to be made), the Pilots would like to incorporate into ERISA, by analogy, the decisions under IRC § 401 which prohibit employer discretion in the establishment of employee benefit computational formulae.

Specifically, the Pilots would like to rely on Rev. Rul. 79-90, 1979-1 C.B. 156. That ruling, issued to explain the "definitely determinable benefits" requirement of Reg. 1.401-1(b)(1)(i), provides:

> Whenever the amount of a benefit in a defined benefit plan is to be determined by some procedure (such as "actuarial equivalent", "actuarial reserve", or "actuarial reduction") which requires the use of actuarial assumptions (interest, mortality, etc.) *the assumptions to be used must be specified within the plan in a manner which precludes employer discretion.*

(Emphasis added.) Therefore, to qualify as an IRC § 401 pension, a plan must eliminate employer discretion from the establishment of its actuarial assumptions. The Pilots would like us to impose this obligation on American Airlines. We decline the Pilots' invitation to take this step.

Since the IRS believed that Rev. Rul. 79-90 was a novel decision, the IRS devised a plan for phasing-in its effectiveness. For pension plans in existence on March 12, 1979 (the date of Rev. Rul. 79-90), the Ruling would first become effective for plan years beginning on or after December 31, 1983. For plans which were not in existence on March 12, 1979, the Ruling would become immediately effective. Finally, even if a plan's existence pre-dated March 12, 1979, if that plan already included its actuarial assump-

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tions (i.e.: if the plan unwittingly complied with the revenue ruling) those assumptions could *not* be removed.

There can be no question either that the Plan was in existence on March 12, 1979 or that, on that date, the Plan was not in compliance with the employer discretion prohibitions contained in Revenue Ruling 79-90. Furthermore, there is no doubt that the IRS gave non-complying pension plans until December 31, 1983—well after the relevant time frame in this case—to come into compliance with its new ruling. Given this grace period, and given the fact that the IRS' section 401 treasury regulations and revenue rulings are neither incorporated into ERISA, *see* 29 U.S.C. § 1202(c), nor binding on us in this situation, *see* *Carle Foundation v. United States*, 611 F.2d 1192, 1195 (7th Cir. 1979), we see no reason to immediately impose upon American a provision with which it was given years to comply.

Accordingly, we affirm the decision of the district court insofar as it granted summary judgment for the appellees with respect to Count I.

B. COUNTS II THROUGH IV

Count II alleges that the new actuarial figure set by American Airlines (the "Moody's + 1" rate) did not, in fact, achieve actuarial equivalence and, therefore, violated ERISA § 203, 29 U.S.C. § 1053. Count III alleged that the pension plan's fiduciaries breached their duty by increasing the interest assumption in order that American Airlines (neither a plan participant nor a beneficiary) would be economically benefited. Both of these counts are closely related and both turn upon whether the plan fiduciaries appropriately set the new, floating-rate interest factor. In granting summary judgment in favor of the appellees on Counts II and III, the district judge apparently concluded that "[t]he defendants' action [in changing the interest assumption] served to insure actuarial equivalence." Order at 6. We believe that this factual finding was inappropriate given the summary judgment posture of this case.

Summary judgment may be granted only if the record indicates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). As we stated in *Munson v. Friske*, 754 F.2d 683, 690 (7th Cir. 1985) (citations omitted):

> In reviewing a summary judgment, an appellate court must view the entire record and the inferences drawn therefrom in the light most favorable to the party opposing the motion. If a study of the record reveals that inferences contrary to those drawn by the trial court might be permissible, then the summary judgment should be reversed.

In this case, the appellants were able to raise a material issue of fact regarding the actuarial appropriateness of setting the interest assumption at the "Moody's + 1" rate. One of the appellants' experts, Mr. Carl H. Fischer, stated, as follows, in his affidavit:

> *Actuarial Equivalence of Lump Sum Distributions.* In my professional opinion, actuarial equivalence must be determined on the basis of reasonable actuarial assumptions, consistently applied, including a reasonable interest assumption. Reasonableness implies a range and there is, therefore, no single interest rate which, alone, constitutes the reasonable interest assumption for purposes of actuarial equivalence. In my opinion, during the period from February, 1981, through September, 1982, during which most of the plaintiffs retired:
>
> (a) 8½% was, and continued to be, well within the range of reasonable interest assumptions for purposes of determining the actuarial equivalence of lump sum distributions.
>
> (b) The highest reasonable interest rate for purposes of determining actuarial equivalence of lump sum distributions was the rate promulgated by the Pension Benefit Guaranty Corporation for valuing immediate annuities, which rate, during the period in question, ranged from a low of 9¾% to a high of 11%.

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(c) During a period of high volatility in market rates of interest, a variable interest rate, indexed to a standard intended to reflect current market rates of interest, with no provision for eliminating the extremes of the fluctuations through averaging or some other technique, does not provide a reasonable interest assumption for purposes of determining the actuarial equivalence of lump sum distributions.

(d) A variable interest rate, one percentage point greater than the Moody's Aaa Corporate Bond Rate for the third month prior to retirement, was not, during the period in question, a reasonable basis for determining actuarial equivalence of lump sum distributions under the American [Airlines] Plan.

R.106 at 33-34. In his deposition, Mr. Fischer also often repeated his belief that an interest assumption, in order that it accurately result in an actuarially equivalent amount in times of fluctuating interest rates, must incorporate some form of averaging which will moderate large, short-term changes in the current market interest rate. R.117, Ex. W at 12, 13, 20, 21, 22. This testimony provided sufficient evidence, especially in light of the rather incomplete record on this point, to create a disputed issue of material fact. Accordingly, we reverse the district court's grant of summary judgment on Counts II and III, and we remand this case for further record development and proceedings. Additionally, since Count IV (seeking injunctive relief against the conduct which forms the basis for Counts I through III) is closely related to and, in part, derivative of Counts II and III, we reverse the grant of summary judgment on that count also and we remand it along with the other two counts.[8]

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[8] We leave it to the district court to determine, in the first instance, whether any or all of the appellants' releases are valid and enforceable.

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III

In sum, we hold that summary judgment in favor of the appellees was appropriate with respect to Count I since there was no plan amendment. Accordingly, we affirm the district court's judgment with respect to Count I. However, with respect to Counts II through IV, we find that resolution of these three counts requires additional findings on a disputed issue of material fact. Therefore, we reverse the district court's grant of summary judgment and we remand this case for further proceedings. Each party will bear its own costs of this appeal.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

No. 81 C 6770

In the

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROY E. DOOLEY, JR., et al.,

Plaintiffs,

v.

AMERICAN AIRLINES, INC., et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs, who are 58 recently retired airline pilots, filed a four-count complaint against their former employer, American Airlines, Inc., its pilot pension plan, and the Plan fiduciaries to recover damages for an alleged illegal reduction of their lump sum pensions. Both parties are in agreement as to the pertinent facts. American Airlines administers a retirement benefit program for its pilots which consists of two plans, the Variable Income Plan and the Fixed Income Plan. When a pilot retires from American Airlines he is eligible to draw benefits from both Plans. Under the Fixed Income Plan, a retiring pilot is entitled to a lifetime annuity. The retiring pilot may elect to receive his payment as a joint and survivor annuity, a ten-year guaranteed payment, a "level income" payment or under an "open option". It was under the "open option" that the 58 plaintiffs elected to receive their benefits in a lump sum payment.

On October 26, 1978 the lump sum option was adopted. American Airlines notified its employees of the "lump sum" option through a bulletin which indicated that the lump sum

benefit would be a payment equal to the annual benefit yet multiplied by a lump sum annuity factor based on a discount interest rate of 8½% and the 1971 Group Annuity Mortality Table.

In December of 1979 American Airlines decided to change its formula for computing lump sum benefits. A second bulletin was posted on April 22, 1980 indicating that effective January 1, 1981, the Plan would use a variable interest rate to compute lump sums paid out of the Fixed Income Plan. The new rate would be a fluctuating rate calculated by adding an additional percentage point to the interest rate set by Moody's Aaa Corporate Bond Rate. The bulletin also indicated that there would be a phase-in period whereby commencing in February 1981 monthly increments of 2% would be added to the then existing rate of 8.5% until the Moody's-plus-one rate was reached.

Count I of plaintiffs' third amended complaint is brought under § 502(a)(1)(B) of ERISA. Specifically plaintiffs allege that the purpose and effect of defendant American Airlines' unilateral discontinuance of the 8½% interest assumption and substitution of a variable interest rate indexed to Moody Aaa corporate bond rate in computing lump sum distributions under defendants' Plan was to increase substantially the rate of interest used in determining the lump sum distribution entitlement of participants retiring on and after February 1, 1981. Plaintiffs further allege that as a result of the increased assumption, the aggregate dollar amounts of lump sum distributions to which participants of defendant Plan retiring on or after February 1, 1981 are entitled are substantially less than such participants would have received had such distributions continued to be computed on the basis of the 8½% interest assumption previously used. Plaintiffs assert that defendants' unilateral change in the interest assumption constituted an amendment to the Plan having the effect of decreasing the participants' accrued rights in violation of § 204(g) of ERISA, 29 U.S.C. § 1054(g).

Count II of plaintiffs' third amended complaint is brought under section 502(a)(1)(B) of ERISA (29 U.S.C. §§ 1132(a)(1)(B) as amended). In Count II plaintiffs assert that the interest assumption adopted by the defendants is unreasonably high and that as a result of the increased interest assumption, the lump sum distributions paid to participants of defendants' Plan retiring on and after February 1, 1981, including plaintiffs, are not actuarially equivalent to the Basic Retirement annuities such participants otherwise were entitled to receive. Plaintiffs therefore assert violations of defendants' Plan and section 203 of ERISA (29 U.S.C. 1053 as amended).

Count III of plaintiffs' third amended complaint is brought under sections 502(a)(2) and 409(a) of ERISA (29 U.S. §§ 1132(a)(2) and 1109(a)) as amended and alleges a breach of defendant American and individual defendants' fiduciary duties to defendant Plan, its participants and beneficiaries. Specifically plaintiffs allege that the change in interest assumption was conceived and implemented by defendants for the purpose of profiting defendant American through reduced contributions to the Plan in order to divert funds to its own corporate purposes.

Count IV of plaintiffs' third amended complaint is brought under section 502(a)(3) of ERISA (29 U.S.C. § 1132(a)(3) as amended) and seeks to enjoin defendants from implementing and enforcing the change in interest assumption or any other change in interest assumption which decreases accrued benefits against plaintiffs. Count IV also seeks attorney's fees and costs.

The motions which are currently before me are the motion of the plaintiffs for summary judgment on Count I of their third amended complaint and the cross-motion of the defendants for summary judgment on Counts I-IV of the plaintiffs' third amended complaint. The sole issue remaining in this case is a question of law which is appropriate for summary judgment. Specifically the question of law before

the court is whether defendants' conduct constituted a violation of ERISA.

The Plan in question specifically provides that any alternative form of payment must be "actuarially equivalent" to a retiree's Basic Retirement annuity. "Actuarially equivalent" is defined in the Plan as "the equivalent in value on the basis of actuarial factors approved from time to time by American Airlines." The maintenance of actuarial equivalence is an obligation imposed upon defendants by specific provisions of the Plan. Administrative changes in the interest rates are mandatory under the Plan and are the means of maintaining actuarial equivalence. As stated in *Grand Union Co. and Independent Transportation Employees Assoc.*, 82 ARB ¶8843 (June 2, 1982),

> When money can be invested at a higher rate of interest, it requires a smaller lump sum to fund a future stream of retirement benefits, and the fall of the lump sum option dollar amount was a "mathematical fact of life"—freezing the interest rate would have produced a lump sum windfall.

The administrators of the Plan were charged with the responsibility of acting for the benefit of all participants of the Plan. I am persuaded by defendants' memorandum and the United States District Court for the Northern District of Georgia Atlanta Division's decision in *Lewis v. Fulton*, No. C82-736A slip opinion (N.D. Ga. Aug. 31, 1983) that defendants' change in the discount interest rate did not constitute a "plan amendment" under ERISA and did not cause an unlawful reduction in plaintiffs' retirement benefits. I am not persuaded by plaintiffs' arguments regarding Revenue Rulings 79-90 1979-1 LB. 155 and 81-D, 1981-1 C.B. 228. I will adopt the findings of the Georgia District Court regarding these Revenue rulings.

I therefore find that defendants are entitled to summary judgment on Counts I-IV of plaintiffs' third amended complaint. The fact that the dollar amounts of the lump sum

option payments may have fallen as a result did not change the Plan or participants' rights under the plan. The Plan required that the lump sum payment be actuarially equivalent to the retirees' Basic Retirement annuity. The defendants' action served to insure actuarial equivalence. Accordingly, the defendants are not guilty of violating their fiduciary duties. Rather, I find that the defendants exercised good judgment in instituting the variable rate which will provide actuarial equivalence between the available options.

The plaintiffs' motion for summary judgment is hereby denied. The defendants' motion for summary judgment on Counts I-IV of the plaintiffs' third amended complaint is granted. It is so ordered.

ENTER:

James B. Parsons

April 17, 1985

APPENDIX B
(Statutes and Regulations Involved)

STATUTES INVOLVED

Section 3(1), (2) and (3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(1), (2) and (3)

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits

under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which—

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

Section 204(g) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1054(g)

Prior to Amendment by Retirement Equity Act of 1984:

§ 1054

(g) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title.

Subsequent to Amendment by Retirement Equity Act of 1984:

§ 1054

(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of—

> **(A)** eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> **(B)** eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

Section 402(a) and (b) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1102(a) and (b)

§ 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who

jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

**Section 414 of the
Employee Retirement Income Security Act of 1974,
29 U.S.C. § 1114**

§ 1114. Effective date

(a) Except as provided in subsections (b), (c), and (d) of this section, this part shall take effect on January 1, 1975.

(b)(1) The provisions of this part authorizing the Secretary to promulgate regulations shall take effect on September 2, 1974.

(2) Upon application of a plan, the Secretary may postpone until not later than January 1, 1976, the applicability of any provision of sections 1102, 1103 (other than 1103(c)), 1105 (other than 1105(a) and (d)), and 1110(a) of this title, as it applies to any plan in existence on September 2, 1974, if he determines such postponement is (A) necessary to amend the instrument establishing the plan under which the plan is maintained and (B) not adverse to the interest of participants and beneficiaries.

(3) This part shall take effect on September 2, 1974, with respect to a plan which terminates after June 30, 1974, and before January 1, 1975, and to which at the time of termination section 1321 of this title applies.

(c) Section 1106 and 1107(a) of this title (relating to prohibited transactions) shall not apply—

(1) until June 30, 1984, to a loan of money or other extension of credit between a plan and a party in interest under a binding contract in effect on July 1, 1974 (or pursuant to renewals of such a contract), if such loan or other extension of credit remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be, and if the execution of the contract, the making of the loan, or the extension of credit was not, at the time of such execution, making, or extension, a prohibited transaction (within the meaning of section 503(b) of Title 26 or the corresponding provisions of prior law);

(2) until June 30, 1984, to a lease or joint use of property involving the plan and a party in interest pursuant to a binding contract in effect on July 1, 1974 (or pursuant to renewals of such a contract), if such lease or joint use remains at least as favorable to the plan as an arm's-length transaction with an unrelated

party would be and if the execution of the contract was not, at the time of such execution, a prohibited transaction (within the meaning of section 503(b) of Title 26) or the corresponding provisions of prior law;

(3) until June 30, 1984, to the sale, exchange, or other disposition of property described in paragraph (2) between a plan and a party in interest if—

(A) in the case of a sale, exchange, or other disposition of the property by the plan to the party in interest, the plan receives an amount which is not less than the fair market value of the property at the time of such disposition; and

(B) in the case of the acquisition of the property by the plan, the plan pays an amount which is not in excess of the fair market value of the property at the time of such acquisition;

(4) until June 30, 1977, to the provision of services, to which paragraphs (1), (2), and (3) do not apply between a plan and a party in interest—

(A) under a binding contract in effect on July 1, 1974 (or pursuant to renewals of such contract), or

(B) if the party in interest ordinarily and customarily furnished such services on June 30, 1974, if such provision of services remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be and if such provision of services was not, at the time of such provision, a prohibited transaction (within the meaning of section 503(b) of Title 26) or the corresponding provisions of prior law; or

(5) the sale, exchange, or other disposition of property which is owned by a plan on June 30, 1974, and all times thereafter, to a party in interest, if such plan is required to dispose of such property in order to comply

with the provisions of section 1107(a) of this title (relating to the prohibition against holding excess employer securities and employer real property), and if the plan receives not less than adequate consideration.

(d) Any election, or failure to elect, by a disqualified person under section 2003(c)(1)(B) of this Act shall be treated for purposes of this part (but not for purposes of section 1144 of this title) as an act or omission occurring before the effective date of this part.

Section 502(a) of the
Employee Retirement Income Security Act of 1974,
29 U.S.C. § 1132(a)

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

Section 411(d)(6) of the Internal Revenue Code of 1954, 26 U.S.C. § 411(d)(6)

Prior to Amendment by Retirement Equity Act of 1984:

§ 411(d)

(6) Accrued benefit not to be decreased by amendment.— A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8).

Subsequent to Amendment by Retirement Equity Act of 1984:

§ 411(d)

(6) Accrued benefit not to be decreased by amendment.—

(A) In general.—A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8), or section 4281 of the Employee Retirement Income Security Act of 1974.

(B) Treatment of certain plan amendments.—For purposes of subparagraph (A), a plan amendment which has the effect of—

(i) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(ii) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the pre-amendment conditions for the subsidy. The Secretary may by regulations provide that this subparagraph shall not apply to a plan amendment described in clause (ii) (other than a plan amendment having an effect described in clause (i)).

Section 7805 of the Internal Revenue Code of 1954, 26 U.S.C. § 7805

§ 7805. Rules and regulations

(a) Authorization.—Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary or his delegate shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

(b) Retroactivity of regulations or rulings.—The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.

REGULATION INVOLVED

IRS Regulations
§ 1.401-1(b)(1)(i)

§ 1.401-1. Qualified pension, profit-sharing, and stock bonus plans—

(b) General rules. (1)(i) A pension plan within the meaning of section 401(a) is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement. Retirement benefits generally are measured by, and based on, such factors as years of service and compensation received by the employees. The determination of the amount of retirement benefits and the contributions to provide such benefits are not dependent upon profits. Benefits are not definitely determinable if funds arising from forfeitures on termination of service, or other reason, may be used to provide increased benefits for the remaining participants (see § 1.401-7, relating to the treatment of forfeitures under a qualified pension plan). A plan designed to provide benefits for employees or their beneficiaries to be paid upon retirement or over a period of years after retirement will, for the purposes of section 401(a), be considered a pension plan if the employer contributions under the plan can be determined actuarially on the basis of definitely determinable benefits, or, as in the case of money purchase pension plans, such contributions are fixed without being geared to profits. A pension plan may provide for the payment of a pension due to disability and may also provide for the payment of incidental death benefits through insurance or otherwise. However, a plan is not a pension plan if it provides for the payment of benefits not customarily included in a pension plan such as layoff benefits or benefits for sickness, accident, hospitalization, or medical expenses (except medical benefits described in section 401(h) as defined in paragraph (a) of § 1.401-14).

No. 86-725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROY E. DOOLEY, JR., ET AL.,
Petitioners,

vs.

AMERICAN AIRLINES, INC., ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

1) Whether the Court of Appeals was correct in affirming the district court's holding that the Plan Administrator's change in the interest rate assumption used in the calculation of lump-sum payments as an exercise of discretion expressly accorded it by the terms of the Plan did not constitute a plan amendment under Section 204(g) of The Employee Retirement Income Security Act of 1974; and

2) Alternatively, even if the Court of Appeals should have reached the issue whether the change in the interest rate assumption used in the calculation of lump-sum payments reduced Petitioners' accrued benefits under Section 204(g) of The Employee Retirement Income Security Act, whether the use of an interest rate reflecting the estimated rate of investment return of the pension trust not only did not reduce Petitioners' accrued benefits, but also served to protect the fiscal integrity of the Plan.

LIST OF PARTIES

The parties to the proceeding below were the Petitioners Roy E. Dooley, Jr., Thomas F. Latta, Lionel T. Alexander, Lowell W. Armstrong, Buford O. Baker, W. S. Baugh, Alvin Bradley, William H. Burgess, Hugh T. Clark, Byron S. Cramblet, Frank J. Cusare, Clarence O. Day, Jr., E. R. Dozier, Clyde E. Driggers, R. M. Euwema, J.R. Fitzgerald, William D. Fulton, Ralph E. Green, Walter J. Gromel, William J. Goeke, Frank G. Hart, F. J. Hazzard, Howard F. Jenkins, Jr., James G. Johnson, Frank Kaplowitz, Norman L. Kleman, W. C. Kraemer, A.P. Lang, H. D. Leavell, Ralph W. Long, Jr., Dale F. Mabry, Joseph K. Marks, Robert W. Martin, Boniface J. Mayer, Edward O. McKown, Jr., Harold R. Miller, H. C. Milton, George A. Moculski, Earl M. Morrow, Stanley R. Nielsen, Arne E. Oas, George A. Oden, Wayne C. Parris, Robert K. Parsons, Angelo B. Perriello, J. C. Pollard, Edward C. Price, Russell A. Quandt, John J. Ranck, Harvey R. Rice, H. E. Rogers, W.J. Roth, J.M. Rutledge, R.C. Speck, and Willard I. Staples, and the Respondents American Airlines, Inc., the American Airlines, Inc., Fixed Income Plan of the Pilot Retirement Benefit Program, G. E. Overbeck, T.G. Plaskett, T.F. Quinn, Jr., C. A. Pasciuto and N.W. Byl. The above named Petitioners and Respondents include all of the parties to the proceedings below and in this Court. Respondent American Airlines, Inc. is a wholly owned subsidiary of AMR Corporation. The affiliates of American Airlines, Inc. are AMR Services Corporation, American Airlines Direct Marketing Corporation and AMR Information Services, Inc.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, AMERICAN AIRLINES, INC., ET AL., pray that the Petitioners' Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 5, 1986 with respect to Count I of Petitioners' Third Amended Complaint be denied.

STATEMENT OF THE CASE

1. Nature of the Case

Respondent American Airlines, Inc. maintains and is the Plan Administrator of a Pilot Retirement Benefit Program which is subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. Petitioners are retired former American Airlines pilots who requested and received lump-sum payouts of their retirement benefits from the Fixed Income Plan of the Pilot Retirement Benefit Program. After receiving their lump-sum payments,

Petitioners filed suit pursuant to Section 502(a) of ERISA, 29 U.S.C. § 1132(a), challenging one aspect of the computation of their lump sums. Named as defendants in that suit were Respondents American Airlines, Inc., the Fixed Income Plan, and the five members of the American Airlines Pension Benefits Administration Committee serving during the time period relevant to the lawsuit.

Upon retirement, an American Airlines pilot employee is entitled to his Basic Retirement Annuity as defined by Article II(l) and Section 7.3 of Article VII of the Fixed Income Plan (the "Plan"). (Doc. No. 85, Ex. A).[1] That Basic Retirement Annuity is defined in Article II(l) as "an annual amount determined in accordance with Section 7.3. . . ." (Doc. No. 85, Ex. A).[2] The Basic Retirement Annuity, according to Section 7.3 of the Plan, is "an annual amount equal to 1.25% of such Member's Final Average Compensation multiplied by the amount of his or her Credited Service less one year." (Doc. No. 85, Ex. A).

Although the primary purpose of the Plan is to provide a retirement annuity to a participant who retires under the Plan, (Doc. No. 85, Ex. A, § 7.1), the annuity may be received, at the retiree's discretion, under one of several alternative payment plans, including an "open option". (Doc. No. 85, Ex. A, § 10.4). Under the "open option" alternative, the Plan Administrator agreed effective October 26, 1978, to approve retiring pilots' requests for single lump-sum payments of their retirement annuities. (Doc. No. 85, Ex. B).

The Plan specifically provides that any of the alternative forms of payment, which would include any lump-sum

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[1] References to Document No. ____ are references to the Docket Number of the cited document in the Record on Appeal. References following the Document Number identify the particular part of the document cited.

[2] The terms of the Plan, as set forth herein, are quoted from Document No. 85, Ex. A, the Plan as it was for the time period relevant to this suit.

payment, must be "actuarially equivalent" to a retiree's Basic Retirement Annuity. (Doc. No. 85, Ex. A, § 10.4). At all times relevant to this lawsuit, American's Plan defined "actuarial equivalent" as "the equivalent in value on the basis of actuarial factors approved from time to time by American Airlines." (Doc. No. 85, Ex. A, Art. II(d)). Thus, the maintenance of actuarial equivalence was an affirmative obligation imposed by the provisions of the Plan.

Actuarial equivalence is determined by the Plan Administrator through the use of a present value conversion which involves multiplying the annual benefit otherwise provided under the Plan by a lump-sum annuity factor. (Doc. No. 84 at 10). The annuity factor is calculated by using a discount interest rate and an entry from a mortality table. (Doc. No. 84 at 10). Neither the annuity factor, nor the discount interest rate and the mortality table which comprise it, was stated in the Plan at any time relevant to this lawsuit. (*See* Doc. No. 85, Ex. A).[3]

The interest rate assumption is an estimate of what the pension trust fund assets would earn in the future, in order to account for the fact that after payment of the lump-sum, the trust fund would no longer earn interest on that money as it would if the money remained in the fund and was paid out in monthly annuity payments. (Doc. Nos. 85, Ex. C at 5 and 117, Ex. W at 11). The result of the computation must be such that the pension fund is not adversely affected by the retiree's choosing a lump-sum payment of his retirement benefit. (Doc. No. 85, Ex. C at 5). Otherwise, of course, actuarial equivalence would not have been achieved and the retiree would have received more than that to which he had been entitled under the Fixed Income Plan.

[3]The lump-sum option was later added to the Plan, but the actuarial assumptions used to compute lump sums were not. Petitioners admit this to be true. (Petitioners' Appellate Brief at 10).

The Plan Administrator announced the availability of the single lump-sum cash payment under the "open option" provision on October 26, 1978 in its Bulletin 547-78. (Doc. No. 85, Ex. B). As established in the affidavit of Respondents' expert, actuary Willard Hartman, during the four-plus years preceding October 26, 1978, long-term interest rates had fluctuated in the narrow range of 7¾ percent to 9¼ percent. (Doc. No. 85, Ex. C at 6-7). Accordingly, in Bulletin 547-78, the Plan Administrator designated an interest rate of 8½ percent and a published group annuity mortality table to be used in a present value conversion of the expected annuity payments into lump sums. (Doc. No. 85, Ex. B). Bulletin 547-78, which identified the initial 8½ percent discount factor did not indicate that either the designated interest rate or mortality table was ever to be included as a part of the Plan. (Doc. No. 85, Ex. B).

Shortly after October, 1978, when the availability of the lump-sum option and the 8½ percent interest discount factor were announced, interest rates began to rise. By year-end 1979, long-term corporate bond rates had reached 10½ percent. (Doc. No. 85, Ex. C at 7). Predictions by economists as to future interest rate levels varied considerably and included predictions that interest rates could reach the unprecedented level of 14 percent to 15 percent in the near future. (Doc. No. 84 at 12). In fact, the prime interest rate reached a high of 21.5 percent by January of 1981. (Doc. No. 85, Ex. C, at page 2 of Ex. II). By year-end 1979, it had become apparent to the Plan Administrator that the 8½ percent discount rate was no longer a realistic measure of the value of a lump sum. (Doc. No. 84 at 12).

Accordingly, on December 26, 1979, in its Bulletin 497-79, the Plan Administrator announced its decision to substitute a floating bond index, Moody's Aaa Corporate Bond

Rate,[4] as the standard for determining the interest rate component of the present value calculation for measuring actuarial equivalence. (Doc. No. 85, Ex. D). Under the announced procedure, the interest rate to be used would be that determined by reference to the yield established by the Moody's Aaa Corporate Bond Rate index, plus one percentage point,[5] for a time period close to the date of retirement of the participant electing the single-sum option. (Doc. No. 85, Ex. D). American Bulletin 497-79 explained that this choice of an index automatically assured the trust and Plan members that a lump-sum payment would be the equivalent of a Basic Retirement Annuity:

> A lump-sum distribution is a single sum payment which is made in substitution for a series of pension payments over the period of the participant's life expectancy. The current interest rate used in making lump-sum distributions is 8½%. The purpose of this revision is to conform such interest rate to currently prevailing interest rates and to the Company's expectation for return on investment of pension assets for the intermediate term, that is, the term over which the series of payments would be made. The one percentage is added to reflect the fact that the pension trust includes both lower-rated bonds and equities which generally provide higher rates of return.

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[4] Moody's Corporate Bond Ratings are described in Moody's Industrial Manual as "the opinion of Moody's Investors Service, Inc. as to the relative investment classification of bonds. Bonds which are rated Aaa are judged to be of the best quality." *Moody's Industrial Manual*, Vol 1, at v-vi (1983).

[5] The one percentage point is added to reflect the fact that the American Airlines pension trust includes both lower-rated bonds and equities which generally provide higher rates of return. (See Doc. No. 85, Ex. D).

(Doc. No. 85, Ex. D). This Bulletin was personally addressed to each pilot and was placed in each pilot's personal company mail box. (Doc. No. 84 at 13).

The use of the bond index was phased in over a period of several months. (Doc. No. 85, Ex. E). The interest rate to be used in calculating lump-sum distributions was 10½ percent as of February 1, 1981, 12½ percent as of March 1, 1981, 14½ percent as of April 1, 1981, and so on in 2 percent monthly increments until the rate described above equalled the Moody's Aaa Corporate Bond Rate plus one percentage point. (Doc. No. 85, Ex. E).

All Petitioners retired between February 1, 1981, and October 1, 1982. (Doc. No. 67, ¶s 2(a)-(eee); Doc. No. 81, ¶s 2(a)-(ee)). Each Petitioner voluntarily chose to receive a lump-sum payment from a number of available options after notice of the change in the interest assumption.

The record shows that that all but one of the Petitioners rolled over their lump-sum payments into Individual Retirement Accounts in order to postpone taxation on the lump sums. (Doc. No. 84 at 14-15). The table which is attached as Exhibit I to actuary Willard Hartman's affidavit illustrates that indeed, several of the Petitioners have received returns on their investments at much higher rates than were assumed in the calculation of their lump sums. (Doc. No. 85, Ex. I to Ex. C). In fact, several Petitioners for whom information was available received annualized returns on their investment as high as 23 percent. (Doc. No. 85, Ex. III to Ex. C). Petitioner Kraemer was notified by his investment manager that he was earning just under 25 percent on his lump sum. (Doc. No. 85, Ex. 6).

2. Course of Proceedings and Disposition in Courts Below

Count I of Petitioners' Third Amended Complaint asserted that the change in interest assumption constituted an "amendment" to the Plan and reduced Petitioners'

"accrued benefits" under the Plan in violation of § 204(g) of ERISA, 29 U.S.C. § 1054(g). Count II asserted, alternatively, that the index chosen by the Plan Administrator to be used as the interest assumption was unreasonably high, and that its choice was in violation of the terms of the Plan and the vesting provisions of § 203 of ERISA, 29 U.S.C. § 1053. Count III contended that the change in the interest assumption was motivated by an alleged desire on the part of Respondents to reduce American Airlines' future contributions to the Plan and that such a desire would constitute a violation of § 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A). Finally, Count IV sought injunctive relief from the acts alleged in Counts I through III.

Respondents moved for summary judgment on all four counts of Petitioners' Third Amended Complaint. Petitioners moved for partial summary judgment on the basis of Count I. In a Memorandum Opinion and Order entered April 17, 1985, Judge James B. Parsons granted Respondents' Motion for Summary Judgment on all four counts and denied Petitioners' Motion for Partial Summary Judgment on Count I. *Dooley v. American Airlines, Inc. et al.*, No. 81 C 6770, slip opinion (N.D. Ill. Apr. 17, 1985) (Slip op., Pet. App. A at A-19).[6]

Judge Parsons held that "defendants' change in the discount interest rate did not constitute a 'plan amendment' under ERISA and did not cause an unlawful reduction in plaintiffs' retirement benefits." (Slip op., Pet. App. A at A-18). Judge Parsons recognized that "the Plan required that the lump sum payment be actuarially equivalent to the retirees' Basic Retirement Annuity", *id.*, and that "[a]dministrative changes in the interest rates are mandatory under the Plan and are the means of maintaining actuarial

[6] References to Pet. App. A at ____ are references to the opinion of the district court and Court of Appeals in this case as reprinted in Appendix A to Petitioners' Petition for a writ of certiorari.

equivalence." (Slip op., Pet. App. A at A-18).[7] The Court of Appeals for the Seventh Circuit affirmed the district court's grant of summary judgment in favor of Respondents with respect to Count I, *Dooley v. American Airlines, Inc. et al.*, 797 F.2d 1447 (7th Cir. 1986), and reversed with respect to Counts II through IV, remanding those counts for further proceedings. (Slip op., Pet. App. A at A-11, 13-14).

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT CORRECTLY DECIDED THAT THERE WAS NO PLAN AMENDMENT AS ALLEGED IN COUNT I OF PETITIONERS' THIRD AMENDED COMPLAINT AND THEREFORE, RESPONDENTS WERE ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

A. The Plan Administrator's change in the interest rate assumption used in the calculation of lump-sum payments as an exercise of discretion expressly accorded it by the Plan did not constitute a Plan amendment.

There is no support either in ERISA or in applicable case law for Petitioners' argument that the Plan Administrator's change in an interest rate assumption which was not stated as a term of the Plan constituted a plan amendment under ERISA 204(g), 29 U.S.C. § 1054(g). Section 204(g) provided that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan. . . ." 29 U.S.C. § 1054(g). As recognized by the Seventh Circuit, there are two parts to the prohibition—there must be

[7] Petitioners' statement at page 5 of their Petition that the district court referred only to the issues as to Count I is truly misleading as even a cursory review of the remainder of that decision would reveal. However, their statement is irrelevant here since only Count I is at issue in their Petition.

both a plan amendment and a resulting reduction in a participant's accrued benefit before a violation of this statutory provision will occur. (Slip op., Pet. App. A at A-7).

ERISA provides no definition of the term "amendment". However, the Court of Appeals for the District of Columbia Circuit recently analyzed this provision in detail in *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552 (D. C. Cir. 1984), *cert. denied*, 469 U.S. 834 (1984). The *Stewart* court, confronted with the issue whether the actions of the trustees of a pension plan constituted an unlawful plan amendment, stated the following:

> We begin by examining the plain language of the provisions in question. Not infrequently, the best guide to what a statute *means* is what it *says*. The Plaintiffs' construction of [ERISA] 203(c)(1)(b) and 204(g) does violence to the plain language of the above sections. . . . 204(g) applies only to 'amendment[s] of the plan.' In both sections, the word amendment is used as a word of limitation. Congress did *not* state that any change would trigger the two provisions. It stated that any change *by amendment* would do so. The district court found, and the plaintiffs admit, that there was no amendment to the plan in the technical sense, i.e., an actual change in the provisions of the plan. True. All that happened was that ¶ 2.09, a provision already incorporated into the plan, was *applied*. Actions authorized by the plan were carried out by the persons authorized to do so.
>
> The plaintiffs' construction would stretch the term amendment nearly to the breaking point.

Stewart v. National Shopmen, 730 F.2d at 1561 (emphasis in the original).

The *Stewart* court's opinion is directly applicable to the present case. In this case, the actuarial factors used by the Plan Administrator to determine the actuarial equivalence

of lump sums were not, and were at no time relevant to this lawsuit ever legally required to be, a term of the Plan. Similar to the plaintiffs in the *Stewart* case, the Petitioners in the instant case admit that there was no "amendment" to the Plan, in that there was no actual change in the provisions of the Plan. (*See* Doc. No. 104 at 5; Petitioners' App. Brief at 9-10.) The American Plan expressly required the Plan Administrator to maintain actuarial equivalence by approving from time to time such actuarial factors as necessary. (Doc. No. 85, Ex. A, 10.4 and Art. II(d)). Thus, as in the *Stewart* case, all that happened here was that the Plan Administrator acted in accordance with its express authority under the Plan. A change in these factors did not constitute an amendment to the Plan.

The Seventh Circuit found the reasoning of the *Stewart* court to be both applicable and persuasive. (Slip op., Pet. App. A at A-8, 9). Applying the reasoning of the *Stewart* court, the Court of Appeals held the following:

> In the context of this particular pension plan, the plan had the authority to change the actuarial assumptions 'from time to time' in an effort to maintain actuarial equivalence. That is precisely what they did in this case. Therefore, we are unwilling to contort the plain meaning of 'amendment' so that it includes the valid exercise of a provision which was already firmly ensconced in the pension document.

(Slip op., Pet. App. A at A-9).

Petitioners attempt to distinguish the *Stewart* case because it involved a multi-employer plan rather than a single employer plan. The weakness of this point in the context of this issue is self-evident. The number of employers contributing to the fund in *Stewart* was irrelevant to that court's analysis of the "amendment" issue. The portion of the *Stewart* opinion relied upon by the Seventh Circuit was its analysis of the meaning of the term "amendment" under

204(g), the exact provision at issue here. The reasoning of the *Stewart* court could not be more on point.

Petitioners' attempt to distinguish the *Stewart* case by reciting its facts is equally unpersuasive. In fact, their recitation of the facts in *Stewart* illustrates the similarity of that case to this one. Petitioners note at page 27 of their Petition that "[i]n the *Stewart* case, the plan expressly authorized cancellation of service credits in particular circumstances." The American Plan expressly authorized the Plan Administrator's action, as noted by the Seventh Circuit. (Slip op., Pet. App. A at A-9). Petitioners noted further at page 27 of their Petition that "the cancellation therefore did not alter the plan provisions (whether those provisions were contained in the formal document or otherwise), did not change the rates at which benefits accrued under the plan, and affected only the employees of the withdrawing employer." The Seventh Circuit found the first point to be true of the instant case, (Slip op., Pet. App. A at A-6 to 11), the second point is also true, (*See* Doc. No. 85 Ex. A and discussion *infra*), and the third point is irrelevant in the context of this case. Petitioners simply have no means of distinguishing the *Stewart* court's analysis of the 204(g) "amendment" issue. Furthermore, although Petitioners presented no case law to support their strained construction of the term "amendment", Respondents cited yet another decision directly on point as to the "amendment" issue.

In *Lewis v. Fulton Federal Savings and Loan Association Pension Retirement Plan*, No. C82-736A, slip op. (N. D. Ga. Aug. 31, 1983) (Slip op., App. A at A-1), the district court decided that no plan amendment had occurred when a change was made in actuarially assumed interest rates which were not stated in the pension plan. The court held, therefore, that no violation of ERISA resulted from that change.

The facts of the *Lewis* case are nearly identical to those of the instant case. The court observed that the employer had

changed from a fixed to a varying interest factor to discount lump sums and that this factor was communicated to employees through a variety of correspondence. However, the interest factor had never been stated in the Fulton Federal Plan. The court did *not* believe that these facts compelled the conclusion that the change in the discount factor constituted an amendment to the Plan. The court stated:

> The Fulton Federal Plan does not specify its actuarial assumptions. There is no interest rate set forth anywhere in the Plan. Moreover, the interest rate used for purposes of determining contributions was subject to being changed from time to time in the discretion of the Committee. It cannot be said that there was a rate specified in the Plan which would have been outside the reach of the Committee's discretion, either for funding purposes or for lump sum discount purposes. *Id.* at 23-24.

(Slip op., App. A at A-18).

Similarly, the Plan Administrator of the American Plan announced in various bulletins to employees the interest rates used in determining actuarial equivalence, but did not at any point set forth such rates in the Plan. Furthermore, as noted above, the American Airlines Plan, like the Fulton Federal Plan, expressly granted the Plan Administrator discretion to change actuarial factors used in determining actuarial equivalence. (Doc. No. 85, Ex. A, Art. II(d)). This discretionary grant of authority enabled the administrators of these plans to comply with the Plans' requirements that any optional form of payment given to a retiree be the actuarial equivalent of that retiree's lifetime annuity.

The district court in this case agreed completely with the *Lewis* court's analysis on this issue. In its Memorandum Opinion and Order, the district court stated that it was "persuaded by defendants' memorandum and the United States District Court for the Northern District of Georgia

Atlanta Division's decision in *Lewis v. Fulton*, No. C82–736A slip opinion (N.D. Ga. Aug. 31, 1983) that defendants' change in the discount interest rate did not constitute a 'plan amendment' under ERISA . . . ." *Dooley v. American Airlines, Inc. et al.* (Slip op., Pet. App. A at A-18).

The district court in this case also found persuasive the decision in *Grand Union and Independent Transportation Employees Association*, 82–2 ARB 8843 (June 2, 1982), (App. A at A-21). In the Grand Union arbitration, the arbitrator considered the same "plan amendment" issue as did the *Lewis* court, *supra*. The arbitrator decided that the Grand Union Plan had not been "amended" by the administrator's use of a new variable rate rather than a prior fixed rate in the computation of lump sums: "What the Employer's Retirement Board did in 1978 to impose a new interest rate calculation did not change that Plan or its pension benefits. By that action the Retirement Board did no more than to exercise a power which the Plan itself clearly authorized in Section 10.7." (App. A at A-26).

Petitioners have cited no statutory or caselaw authority for their contention that an amendment of the American Plan resulted from the change in the actuarial assumption. Nor have they been able to distinguish the authorities cited above by Respondents. The reason for their failure is clear, for as noted by the Seventh Circuit, even common sense dictates that their argument is wrong. (Slip op., Pet. App. A at A-9).

B. In the absence of any statutory or case law authority supporting their contention that actuarial assumptions must be included within the Plan, Petitioners turned to Revenue Rulings 79–90 and 81–12, but those Rulings, if applicable at all, cannot be applied to the American Plan for any time period relevant to this lawsuit.

Having failed to find any statutory or case law authority for their argument that the Plan Administrator's action

here constituted a plan amendment, Petitioners contended that Revenue Rulings 79–90, 1979–1 C.B. 155, and 81–12, 1981–1 C.B. 228, support their position. The district court held that it was not persuaded by Petitioners' arguments regarding Revenue Rulings 79–90 and 81–12. (Slip op., Pet. App. A at A-18). Nor was the Seventh Circuit convinced, for it held not only that Rev. Rel 79–90 was inapplicable to the American Plan at any point in time relevant here, but that it was also not binding on the court. (Slip op., Pet. App. A at A-11).

In 1979, the Internal Revenue Service issued Revenue Ruling 79–90 which initiated a new policy with respect to the inclusion of actuarial assumptions in pension plans. (Slip op., Pet. App. A at A-10). Revenue Ruling 79–90 indicates that actuarial assumptions should be stated in pension plans beginning with the first plan year after December 31, 1983. The IRS recognized the potential impact on existing plans which would be caused by this shift in IRS position. (Slip op., Pet. App. A at A-10). Accordingly, the IRS provided for the delayed effective date which allowed plans already in existence on March 12, 1979 more than four years to comply therewith. American's Plan was already in existence on March 12, 1979. Therefore, Revenue Ruling 79–90 was not applicable to American's Plan at any time relevant to this lawsuit.

Similarly, Revenue Ruling 81–12 is inapplicable to the American Plan for purposes of this lawsuit. Its applicability is completely contingent upon that of Rev. Rul 79–90 and that Ruling's delayed effective date. *Lewis v. Fulton Federal Savings and Loan*, Slip op., App. A at A-18. Furthermore, in *Bencivenga v. The Western Pennsylvania Teamsters*, 763 F.2d 574, 580 (3rd Cir. 1985), the Third Circuit Court of Appeals found the IRS' opinion in Revenue Ruling 81-12 unpersuasive and rejected that Ruling in its entirety.

The *Lewis* court held that Revenue Rulings 79-90 and 81-12, by their terms, did not apply to plans during the

relevant time period (like American's) which were in existence on March 12, 1979. The court rested its conclusion on the prospective (1984) dates of those Revenue Rulings:

> Plaintiffs contend that the defendants' interpretation of the Plan and their actions resulting therefrom violate Rev. Rul. 79–90 and Rev. Rul. 81-12 promulgated by the Internal Revenue Service. The court finds that those revenue rulings are inapplicable to this case and were not violated. Revenue Ruling 79-90 adopted a new policy requiring actuarial assumptions to be specified in a retirement plan. Revenue Ruling 81-12 is dependent upon Rev. Rul. 79-90 for its applicability, and does not apply to plans which are not yet required to comply with Rev. Rul. 79-90. Due to the novelty of the policy set forth in Rev. Rul. 79-90, the IRS provided for delayed application of the revenue ruling to plans already in existence.

(Slip op., App. A at A-17, 18).

Although Petitioners would like to ignore the language of Revenue Ruling 79-90 which granted plan administrators of plans like American's more than four years to change their plans to include actuarial assumptions, they simply cannot. The *Lewis* Court, and the district court and Seventh Circuit here are in accord. (Slip op., App. A at A-17, 18; Slip ops., Pet. App. A at A-18 and A-11).

II.

THERE IS NO CONFLICT IN THE CIRCUITS ON THE AMENDMENT ISSUE.

A. Section 3(2) of ERISA does not require that actuarial assumptions used in the computation of optional forms of payment be stated in a pension plan.

Petitioners believe that any written piece of paper or any spoken word can be imputed to a pension plan, even where, as in the instant case, there is a comprehensive 57-page plan. Petitioners contend, at page 19 of their Petition, that Section

3(2) of ERISA, 29 U.S.C. 1002(2), supports their attempt to impute to the Plan actuarial assumptions which had never been included therein. Petitioners misunderstand the import of Section 3(2).

Section 3(2) defines what a pension plan is and only governs *when* a company will be deemed *to have* a pension plan subject to ERISA. It makes no reference to and has no relevance whatsoever to *what are the terms* of a "plan, fund or program" subject to ERISA. Petitioners quote 3(2) at page 19 then, but then in a cavalier manner, gloss over the fact that Section 3(2) defines a plan "by its express terms *or* [when] as a result of surrounding circumstances such plan, fund or program (i) provides retirement income to employees, or (ii) results in a deferral of income . . . ." 29 U.S.C. 1002(2). It is a well-established principle of law that the word "or" has a very different meaning in statutory construction or contract interpretation than does the word "and". It is clear from the language of Section 3(2) that where there are express terms of a plan, those terms govern, but that an employer will be subject to ERISA even where there is no written plan where the surrounding circumstances show that the employer is providing retirement income to employees.

In support of their ERISA Section 3(2) argument, Petitioners cite *Dependahl v. Falstaff Brewing Corp.*, 491 F. Supp. 1188 (E. D. Mo. 1980), *aff'd in part* and *rev'd in part*, 653 F.2d 1208 (8th Cir. 1981), *cert. denied*, 454 U.S. 968 (1981) and *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982). Petitioners insist that these cases support their definition of the meaning of the term "amendment" and contend that the Seventh Circuit's decision in this case conflicts with these opinions. The *Dependahl* decision provides guidance only as to whether a company's purchase of life insurance may constitute a funded employee welfare benefit plan subject to ERISA. The case focused on whether there was in existence a plan subject to ERISA, not on the proper method of interpreting *the terms of a plan* subject to ERISA. Similarly, the *Donovan* decision

involved the question whether the purchase of health insurance may constitute the establishment of an employee welfare benefit plan under ERISA. Relying upon the *Dependahl* decision, the *Donovan* court indicated that those persons "establishing or maintaining informal or unwritten employee benefit plans" could not escape ERISA's definition of a welfare benefit plan. *Donovan v. Dillingham*, 688 F.2d at 1372. This is so obviously not the case here that the Petitioners' argument that the Seventh Circuit's decision conflicts with the *Dependahl* and *Donovan* decisions is truly remarkable.

The *Donovan* and *Dillingham* cases are irrelevant to an analysis of what is and is not a term of American's 57-page written plan. (See Doc. No. 85, Ex. A.) American Airlines does not dispute that under Section 3(2) its Plan is subject to ERISA. Therefore, Petitioners' reliance on ERISA Section 3(2) is misplaced.

B. American's written plan fully complies with all provisions of ERISA Section 402, none of which requires the statement of actuarial assumptions in a pension plan.

1. American's 57-page written Plan is in full compliance with 402(a)(1).

Contrary to Petitioners' intimation at page 19 of their Petition, the Plan is in full compliance with Section 402(a)(1) of ERISA, 29 U.S.C. § 1102(a)(1), even though actuarial assumptions used to compute actuarial equivalence were not stated therein during the relevant time period. Section 402(a)(1) of ERISA provides only that "every employee benefit plan shall be established and maintained pursuant to a written instrument." The Plan Administrator has complied with this requirement. American's Plan is established and maintained pursuant to a 57-page written instrument. That written instrument was attached to Petitioners' Third Amended Complaint as Appendix A, Doc. No. 67, and

appeared as Exhibit A to Respondents' Memorandum in Support of its Motion for Summary Judgment, Doc. No. 85. That written instrument does not make mention of the discount interest rate which is used to calculate lump sums, nor was there a legal requirement that it do so.

The following analysis in *Haeberle v. Board of Trustees,* 624 F.2d 1132, 1138-39 (2nd Cir. 1980) illustrates Petitioners' error in relying on Section 402(a)(1), 29 U.S.C. § 1102(a)(1):

> First, Haeberle misconceives the meaning of 29 U.S.C. 1102, requiring a written plan. That section anticipates that certain extant pension plans might not have been reduced to the formality of a writing and therefore imposes a requirement of a writing by the effective date of the section. That section, however, has no relevance to the pension plan at issue because the record indicates that a written pension plan had long been in effect.

As the *Haeberle* case shows, Petitioners' reliance on § 402(a)(1) is completely misplaced.

2. ERISA 402(b)(4) does not require that actuarial assumptions be specified in a pension plan.

Petitioners' contention that ERISA § 402(b)(4) requires that actuarial assumptions used in computing actuarial equivalence be stated in the Plan is erroneous. Section 402(b)(4) of ERISA requires employee benefit plans to "specify the basis on which payments are made to and from the plan." 29 U.S.C. 1102(b)(4). Nowhere in ERISA is the term "basis" defined. Petitioners define "basis" to include actuarial assumptions. However, Petitioners have cited no support for this interpretation.

Treasury Regulation 1.401-1(b)(1)(i) provides the only available definition of the term "basis" and it directly contradicts Petitioners' interpretation. That regulation indicates that "[r]etirement benefits generally are measured by and *based* on such factors as years of service and compensation received by the employees." Treas. Reg. 1.401-1(b)(1)(i)

(emphasis added). These are indeed the factors that comprise a retiree's benefit under the American Plan. A retiree's Basic Retirement Annuity is an annual amount equal to 1.25 percent of his Final Average Compensation multiplied by the amount of Credited Service minus one year. (Doc. No. 85, Ex. A, § 7.3). The fact that a retiree's benefit is based upon his compensation and credited service and then, in the case of an optional form of payment, computed in accordance with actuarial assumptions is perfectly clear in the Plan. There was no requirement that the actual assumptions be stated in the Plan any more than there was a requirement that the actual compensation of a retiree be included in the Plan. Under Petitioners' theory, every increase in a pilot's salary would constitute an amendment of the Plan.[8]

There is simply no support for Plaintiffs' allegations of a violation of ERISA 402. Plaintiffs cannot circumvent the plain meaning of § 204(g) by imposing their own interpretive gloss on a different ERISA provision, § 402.

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[8] Plaintiffs' argument with respect to the "definitely determinable benefits" requirement of Treas. Reg. 1.401-1(b)(1)(i) is unpersuasive. Their only support for this argument, Revenue Rulings 79-90 and 81-12, is not applicable to the controversy. Furthermore, Revenue Ruling 79-90 provided that variable interest rate assumptions are acceptable under the "definitely determinable benefits" standard. Moreover, it is ironic that Petitioners argue that the American Plan is not in compliance with certain Treasury Regulations when all but one of them took advantage of the Plan's tax qualified status to roll over their lump sums into Individual Retirement Accounts in order to postpone taxation on the sums. Petitioners have employed the same "logic" in arguing that the substance of Rev. Rul. 79-90 is applicable to the Plan, but that the delayed effective date is not. Petitioners are apparently unconcerned about their selective understanding of these matters.

III.

THERE WAS NO NEED FOR THE SEVENTH CIRCUIT TO REACH PETITIONERS' CONENTION THAT THEIR ACCRUED BENEFITS HAD BEEN REDUCED IN LIGHT OF ITS HOLDING THAT NO PLAN AMENDMENT HAD OCCURRED. EVEN IF THE ISSUE HAD BEEN REACHED, HOWEVER, THE CHANGE IN THE INTEREST ASSUMPTION DID NOT CAUSE A REDUCTION IN PETITIONERS' ACCRUED BENEFITS.

Petitioners have misunderstood the concept of "accrued benefits" from the beginning of this case. Section 204(g)'s prohibition, at all times relevant to this lawsuit, was in two parts—there must be 1) a plan amendment which 2) reduces a retiree's accrued benefit. 29 U.S.C. 1054(g); *Dooley v. American Airlines, Inc.,* (Slip op., Pet. App. A at A-7). Even if Petitioners could somehow show that a plan amendment occurred, and they most definitely cannot, they would also have to show that a reduction in their "accrued benefits" occurred, *not* merely that a reduction in the amount of the lump sums they desired occurred.

As the district court opinion in this case, the *Lewis* opinion and *Grand Union* decision make clear, a reduction in ultimate payout of a retirement option as a result of a change in actuarial assumptions is *not* a reduction in an accrued benefit. *Dooley v. American Airlines, Inc. et al.*, (Slip op., Pet. App. A at A-18); *Lewis v. Fulton Federal Savings and Loan Association Pension Retirement Plan,* No. C82-736A, slip op. (N. D. Ga. Aug. 31, 1983) (App. C at A-12); *Grand Union and Independent Transportation Employees Association,* 82–2 ARB 8843 (June 2, 1982) (App. C at A-26).

The definition of "accrued benefit" contained in Section 3(23)(a) of ERISA does not support Petitioners' argument that lump sums constitute accrued benefits. That ERISA provision states as follows:

(23) The term "accrued benefit" means-

> (A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan, . . . *expressed in the form of an annual benefit commencing at normal retirement age*. . . .

29 U.S.C. 1002(3)(A) (emphasis added). An employee's accrued benefit, as 29 U.S.C. 1002(23)(A) states, is the amount an employee is entitled to receive as an annual benefit at retirement age. *Bencivenga v. Western Pennsylvania Teamsters*, 763 F.2d 574, 577 (3rd Cir. 1985); *Dhayer v. Weirton Steel Division of National Steel Corporation*, 571 F. Supp. 316, 324 (N. D. W. Va. 1983), *aff'd*, *Sutton v. Weirton Steel*, 724 F.2d 406 (1983), *cert. denied*, 467 U.S. 1205 (1984). The statutory "annual benefit commencing at normal retirement age" under American's Plan is the pilot's Basic Retirement Annuity, *not* a pilot's projected lump sum.

The formula for computing American's Basic Retirement Annuity is an annual amount equal to 1.25% of a Plan member's Final Average Compensation multiplied by the amount of his or her Credited Service less one year. Note that no portion of this "accrued benefit" is in any way dependent upon the disputed discount factor. The lump sum may be actuarially equivalent to the accrued benefit—but only if it is calculated in a manner to achieve equivalence.

Petitioners repeatedly turn to Revenue Rulings 79–90 and 81–12 for support with respect to their argument regarding a reduction in accrued benefits. However, as noted *supra*, Petitioners cannot ignore the prospective applicability of those Rulings. If these Revenue Rulings are to provide any guidance at all, they must be viewed in their entirety, not in the selective manner suggested by Plaintiffs.[9] (Slip. op., Pet. pp. A at A-11, 18).

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[9] The important point to be made with respect to Petitioners' claim that the delayed effective date of Rev. Rul. 79–90 is inapplicable here is that the delayed aspect of the Ruling

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The Third Circuit Court of Appeals recently cited this Court's opinion in *Alessi v. Raybestos—Manhattan, Inc.*, 451 U.S. 504 (1981) in *Bencivenga v. The Western Pennsylvania Teamsters*, 763 F.2d 574, 578 (3rd Cir. 1985), and declared that "there may not be an end run around the statutory concept of 'accrued benefits'." The Third Circuit concluded in *Bencivenga*, with respect to actuarial computations of early retirement benefits, that "the most consistent reading of ERISA and the applicable regulations is that altering the discount factor used in computing an early retirement benefit so as to achieve bona fide actuarial equivalence to the normal retirement age benefit is not an impermissible reduction of accrued benefits." *Id.* at 580.[10] Thus, the Third Circuit

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stands on the same ground as any requirements contained in the Ruling. If the IRS does not have the authority to issue such a Ruling as far as the labor provisions of ERISA are concerned, then the Ruling is irrelevant and Petitioners have no support for their claim that actuarial assumptions must be stated in a plan. If the IRS does have the authority to issue such a Ruling and have it apply to the labor provisions, then it has the authority to determine the effective date of the substance of the Ruling.

[10] Petitioners have cited *Amato v. Western Union International, Inc.*, 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 106 S. Ct. 1167 (1986) for the proposition that early retirement benefits are part of the accrued benefit. That case is both distinguishable from the present case on its facts and wrongly decided.

To the extent that the *Amato* decision contains some language which supports the Petitioners' view that early retirement benefits are accrued benefits which may not be diminished under ERISA, Respondents believe that the *Amato* decision is wrong. It is inconsistent on that point with the *Bencivenga* decision in the Third Circuit, 763 F.2d at 577, and the *Weirton Steel* decision in the Fourth Circuit, 724 F.2d at 410. Both the *Bencivenga* and *Weirton Steel* cases are closer on their facts to the instant case than is *Amato* on this issue. For example, in *Bencivenga*, a conceded plan amendment occurred which caused

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is in agreement with the *Lewis* court in the *Fulton Federal* decision and the district court in this case.

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the plaintiff to receive $121 less per month in early retirement benefits than he would have received prior to the amendment. The lower amount resulted from a change in the discount factor used to compute the actuarial equivalence of the early retirement benefit to the normal retirement benefit. The plaintiff alleged a violation of ERISA Section 204(g), as the Petitioners in this case have alleged. Summary judgment was granted in favor of defendants by the district court, and the Third Circuit Court of Appeals affirmed.

The *Amato* case, on the other hand, dealt with two plan provisions providing for full unreduced retirement benefits that could be received by employees meeting certain criteria prior to age 65. The calculation for these benefits was *exactly the same* as that for their benefits at normal retirement age. *There was no issue involving actuarial assumptions.* (After the elimination of the unreduced early retirement benefits, the plaintiffs were still entitled to early retirement benefits that were actuarial reductions of their normal retirement benefits. However, that benefit was not at issue in the case. It was the elimination of the *full, unreduced* benefit prior to age 65 that was at issue.) *Amato* is about a plan which expressly gave retirees early retirement benefits which *were more than* the actuarial equivalents of their normal retirement benefits. The 2d Circuit did not permit early retirement benefits to be eliminated *because* the plan expressly provided for them to be full and *unreduced.* This is not the case here. American's plan provided that the optional payments had to be actuarially equivalent to the Basis Retirement Annuities, *not more than those annuities.*

As the *Amato* court pointed out in distinguishing the *Bencivenga* case from the *Amato* case, the *Bencivenga* case assured that "employees qualifying for an *actuarially—reduced* early retirement benefit would not receive pensions of greater actuarial value than those received at normal retirement age." *Amato v. Western Union International, Inc.*, 773 F. 2d at 1413. As this shows, the *Bencivenga* case and not the *Amato* case is analagous to the present controversy.

The reasoning behind these decisions is sound. For example, in the *Grand Union* arbitration, a grievance was instituted charging that an employee who chose the plan's lump-sum option would receive a smaller payment under the new interest rate than he or she would have received under the prior rate used. The arbitrator found that that result should not have come as a surprise to anyone:

> [W]hen money can be invested at a higher rate of interest, it requires a smaller lump sum to fund a future stream of retirement payments.

(App. A at A-25). The district court found this statement to be true and cited it at page 5 of its Memorandum Opinion in this case. (Slip op., Pet. App. A at A-18).

Petitioners have conceded that the interest rate used in the actuarial equivalency computation must reflect an estimate of what the pension trust could earn on the funds representing the future annuity payments if these funds had remained in the Trust.[11] Yet, the Petitioners continue to

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[11] Even though Petitioners have admitted that this definition of the interest assumption is proper, they suggest that the Plan's valuation rate should be used. The general valuation rate for the Plan was 9½ percent as of January 1, 1981. (Doc. No. 116, pp. 28-29). Petitioners' assertion that this figure should be used merely illustrates their lack of understanding as to what a valuation rate is. The 9½ percent valuation rate is used for all of American's plans, and not just the Fixed Income Plan. Document No. 117, Ex. AA is an excerpt from the deposition of the Plan's consulting actuary, Ken Polk, which explains that this rate reflects many factors which make it inappropriate to use it in isolation, as Petitioners suggest, as the interest assumption for the computation of their lump sums. For example, that rate projects expected rates of return for much longer than the 18.3 year life expectancy of Petitioners. Consequently, it is lower than a rate which is intended to project the 18.3 year period involved here. Moreover, the assumptions used in valuing the Plan are required to be reasonable in the aggregate. (Doc. No. 117, Ex. Z, Supplemental Affidavit of actuary Willard

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confuse a reduction in the amount of actual pay-out, necessitated by the determination that only a higher interest rate will properly reflect this estimate, with a reduction in accrued benefits. The Union in *Grand Union* argued, as do the Petitioners here, that the employer's change in the rate of interest reduced a pension benefit in violation of the Grand Union Plan. The arbitrator decided that the gross amounts of pension benefits could decline without resulting in a violation of the law. (App. A at A-26). In the instant case, the district court reached the same conclusion: "The fact that the dollar amounts of the lump sum option payments may have fallen as a result did not change the Plan or participants' rights under the Plan." (Slip op., App. A at A-18, 19).

The *Lewis* court recognized that the retirees were not entitled to the windfall they sought: "The Plan was not designed to provide windfall benefits. The Committee properly looked to the interest of all participants in preserving the assets of the pension trust and their interpretation of the Plan so as to effect the purposes of the plan and the intent of the parties was not arbitrary or capricious." (Slip op., App. A at A-14, 15). Similarly, the district court recognized in this case that "[t]he administrators of the Plan were

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Hartman). The 9½ percent valuation rate cannot be evaluated separately from the other assumptions with which it used in conjunction. The more appropriate comparison if valuation rates are to be examined in this case is the 16.09 percent rate used to value the portion of the Plan supported by a dedicated bond portfolio. In 1981, American Airlines dedicated a bond portfolio for the payment of benefits for the following twenty-five years of present retirees and vested terminated employees with earnings such that the investment return assumption on that portion of plan liabilities was set at 16.09 percent. (See Doc. No. 106, 1981 American Airlines Actuarial Report attached as Exhibit A to Affidavit of Carl Fischer.) Respondents have admitted that the pension trust was able to purchase this bond portfolio.

charged with the responsibility of acting for the benefit of all participants of the Plan." (Slip op., Pet. App. A at A-18). The district court found that Respondents had "exercised good judgment" in changing the interest rate assumption so that actuarial equivalence would be maintained. (Slip op., Pet. App. A at A-19).

Finally, the *Grand Union* arbitrator noted that acceptance of the plaintiffs' position would undercut the fiscal integrity of the plan:

> That result would not only provide an unfair advantage to those persons, it would as well deplete the Plan's assets and undercut its fiscal integrity for the payment of current and future benefits. I cannot believe the parties intended by their negotiations to accomplish a result so offensive to basic concepts of fairness and common sense.

(App. A at A-27). In fact, the Airline Pilots Association, intervening in this case on behalf of the Respondents, concurs that American Airlines acted lawfully and that Petitioners' position endangers the financial integrity of the Plan.[12]

Several decisions support the *Lewis* and *Grand Union* analyses regarding the protection of plan assets from excessive payouts to a select few retirees. The district court in *Czyz v. General Pension Board*, 578 F. Supp. 126 (W.D. Pa. 1983), found that "the possible dissipation of assets with ensuing loss to participants is a sound basis for fiduciary

[12] Ralph L. Harkenrider, the Executive Administrator of the Allied Pilots Association stated in an Affidavit filed in this case, Doc. No. 85, Ex. K, that the APA supports the Plan Administrator's change in the interest assumption to a fluctuating interest rate, such as one based on Moody's Aaa Corpórate Bond Rate. Mr. Harkenrider further stated that the APA would object to any payments under the lump-sum option which would result in excessive payouts to any one group of Plan participants, such as the Petitioners.

action." *Czyz v. General Pension Board*, 578 F. Supp. at 130 citing *Fine v. Semet*, 699 F.2d 1091, 1095 (11th Cir. 1983). In addition, in *Streeter v. Board of Trustees*, the District Court for the Central District of California held that preservation of the actuarial soundness of a pension plan is obviouly a legitimate plan purpose and may properly serve as the basis for a trustee's action. *Streeter v. Board of Trustees*, 435 F. Supp. 1168, 1171 (C. D. Cal. 1977), *aff'd, Tomlin v. Board of Trustees*, 586 F.2d 148 (9th Cir. 1978). Finally, and most importantly, the district court in this case held that "the defendants exercised good judgment in instituting the variable rate which will provide actuarial equivalence between the available options." (Slip op., Pet. App. A at A-19).[13]

As set forth above, no reduction of an accrued benefit has occurred under the American Plan. The only thing Petitioners have lost is a windfall payment they had hoped to receive through an 8½ percent discount factor which no longer reflected the actuarial equivalence of their accrued benefits.[14]

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[13] It should be noted that Petitioners' entire discussion of actuarial gains and losses at pages 8 and 9 of their Petition is irrelevant to this case. The concept of actuarial gains and losses is related to the method of estimating the amount of funds that needs to be contributed to the pension trust in the future so that regular payments can be made. There is no gain or loss in the real sense. Petitioners admitted at page 35 of their Appellate Brief that actuarial gains and losses do not affect the amount of participants' benefits. Moreover, Petitioners' intimation that American is "appropriating" the investment gains earned on the pension trust is entirely misleading. Petitioners' expert, Mr. Carl Fisher, acknowledged that the Plan is entitled to receive the investment gains on its assets. (Doc. No. 117, Ex. W at 30). Petitioners also acknowledged this fact at page 11 of their Appellate Brief. That is the major difference between a pension plan and profit sharing plan, as Petitioner's expert conceded. (Doc. No. 117, Ex. W at 30).

[14] Petitioners' discussion in footnote 9 with respect to the Retirement Equity Act of 1984, (the "REA") Pub L. 98-397, is irrelevant. The REA was enacted years after the change in the

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Neither the "amendment" nor the "accrued benefits" claim involves an "important question of federal law which must be settled in order to insure the enforceability of basic rights under ERISA." (Pet. for Writ of Certiorari at 10). If they did, this Court would be inundated with requests to review every decision of a pension administrator with which a plan participant disagreed and to substitute its judgment in each case for that of the administrator. The judiciary has historically refused to so interfere. *Czyz v. General Pension Board*, 578 F. Supp. 126 (W. D. Pa. 1983).

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interest assumption at issue in this case. Moreover, the legislative history of the REA expressly provided that *no* inference was to be made from the changes instituted by that Act as to the scope of the prohibitions before the effective date of the Act. Senate Report No. 575, 98th Cong. 2d Sess. 27-28, *reprinted in* (1984) U.S. Code Cong. & Ad. News 2573-74. Petitioners' drawing of inferences despite the above language is unpersuasive. Finally, it should be noted that the specific amendments of the REA render it irrelevant to the present case. The amendments provide that *early retirement benefits* may not be *reduced*, but that *optional benefits* may not be *eliminated*. No one is contending here that the lump-sum option was eliminated.

CONCLUSION

The Court of Appeals correctly decided that the Plan Administrator's change in the interest rate assumption used in the calculation of lump-sum payments in accordance with the discretion expressly accorded it by the Plan did not constitute a plan amendment under Section 204(g) of ERISA. Furthermore, the Court of Appeals correctly decided that it need not reach Petitioners' argument that the change in the interest rate assumption caused a reduction in their accrued benefits under Section 204(g). Even if the Court of Appeals had reached that question, however, Respondents would be entitled to summary judgment on that issue, for, as a matter of law, the actuarial assumption chosen by the Plan Administrator did not cause a reduction in Petitioners' accrued benefits. To the contrary, it ensured that Petitioners received lump sums which were actuarially equivalent to their retirement annuities and preserved the fiscal integrity of the Plan.

In accordance with the foregoing, Respondents pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

AMERICAN AIRLINES, INC., ET AL.

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APPENDIX A

United States District Court

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ARTHUR L. LEWIS and
CAROLYN J. EMBRY,

Plaintiffs,

v.

FULTON FEDERAL SAVINGS AND
LOAN ASSOCIATION PENSION
RETIREMENT PLAN, et al.,

Defendants.

CIVIL ACTION

NO. C82-736A

ORDER

This case was tried to the court without a jury on May 31 - June 2, 1983. It is an action brought by plaintiffs Arthur L. Lewis and Carolyn J. Embry against defendants pursuant to the provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), for lump sum benefits in excess of those offered by defendant Fulton Federal Savings and Loan Association Pension Plan Administrative Committee (the "Committee") and for other relief including interest, punitive damages and attorney fees. Following the close of evidence, the parties submitted their arguments by brief and also submitted proposed findings of fact and conclusions of law. The court has carefully considered the evidence, the briefs and proposed findings submitted by the parties, and hereby makes the following findings of fact and conclusions of law. Rule 52, Fed. R. Civ. P.

THE FACTS

1. Plaintiffs Lewis and Embry are former participants under the Fulton Federal Savings and Loan Association

Pension Retirement Plan (the "Plan"). Plaintiff Lewis was employed by Fulton Federal Savings and Loan Association for almost thirty years, and retired from that employment effective November 30, 1981. Plaintiff Embry was employed by Fulton Federal Savings and Loan Association for approximately 25 years and retired January 15, 1982.

2. The Plan (Plaintiff's Exh. 1) is administered by an "Administrative Committee" which is composed of employees of Fulton Federal Savings and Loan Association, the Plan's sponsor. Members of the Administrative Committee are appointed by the Directors of Fulton Federal Savings and Loan Association and serve at the pleasure of such directors. The members of the Plan Administrative Committee at all times pertinent to this controversy have been made parties defendant.

3. The funds of the Plan are invested and managed by Trustees (collectively referred to as the "Trustee") consisting of five individuals who are all directors of the Plan sponsor, Fulton Federal Savings and Loan Association. The Trustees likewise have been made parties defendant to this action.

4. The Plan which governs the Fulton Federal Pension Retirement Plan allows for the election by a Plan participant of various alternative forms of pension benefit payments, including a lump sum payment which is the "actuarial equivalent" of the periodic benefits which would otherwise and normally have been received in annuity form. Both plaintiffs elected the lump sum payment prior to retirement in accordance with the terms of the Plan.

5. Section 1.02 of the Plan defines the term "actuarial equivalent" as follows:

> Actuarial Equivalent: A benefit of equivalent value, but differing in form from a given benefit, computed on the basis of the mortality tables and interest rate last adopted for purposes of the actuarial evaluation used to determine contributions to the Plan, or on such other

basis as may be adopted by the [Plan Administrative] Committee.

6. Three items of information are necessary in order to compute an actuarially equivalent lump-sum benefit: (1) the amount of "normal" monthly annuity for the individual in question; (2) the life expectancy of the individual based upon mortality tables; and (3) an interest rate assumption with which to discount the future annuity stream of income back to present value.

7. The interest rate referred to in Section 1.02 is called the "actuarial interest assumption". This interest assumption is established from time to time by the Committee, with the advice of the actuaries, and is an approximation of what the Plan and its actuaries believe the Plan is going to earn on its investments over the life of the Plan. The interest rate so established is used in the actuarial calculations necessary for computing the annual employer contributions to the Plan.

8. Section 11.05 of the Plan, entitled "Actuarial Tables and Interest Rates" provides, in pertinent part, as follows:

> The Committee shall adopt from time to time tables for use in all actuarial calculations required in connection with the Plan, and shall establish from time to time, in accord with applicable law, the rate of regular interest which, compounded annually, shall be used in all actuarial calculations required in connection with the Plan. As an aid to the Committee in adopting tables and in fixing the rates of contribution payable to the Plan, the Actuary designated by the Committee shall make annual actuarial valuations of the contingent assets and liabilities of the Plan, and shall certify to the Committee the tables and rates of contribution which he recommends for use by the Committee.

9. The interest assumption last adopted pursuant to section 11.05 for purposes of the actuarial evaluation used to determine contributions to the Plan as of the effective date of retirement of plaintiffs Lewis and Embry was 6% per

annum. The 6% interest rate was not specified in the Plan, but was set by the Committee in its discretion in 1976, it being an assumed interest rate which, taken with other actuarial assumptions, was used for purposes of determining long-term funding needs of the Plan. The 6% interest rate was not intended to reflect prevailing market interest rates at any particular time and, at the time of the retirement of plaintiffs Lewis and Embry, the 6% interest rate was substantially less than the prevailing market interest rate.

10. In 1980 market interest rates began to rise dramatically and the Chairman of the Committee and the Actuary for the Plan consulted regarding the determination of a proper interest rate to be applied to lump sum payments. Their action in this regard was inspired by rising interest rates at a time when an employee made inquiries with respect to the lump sum option.

11. On April 14, 1980, the Actuary for the Plan recommended that the Committee adopt as its policy a procedure whereby actuarial assumptions used for calculating lump sum benefits would be consistent with the actuarial basis on which insurance company annuity purchase rates from time to time are determined. The recommendation was made because a series of lump sum payments using a below market discount assumption "could seriously damage the Plan's funding progress". Plaintiffs' Exh. 62.

12. On June 2, 1980, James C. Roberts, Chairman of the Plan Committee, made inquiries regarding the market rates on insurance company annuities for the purposes of determining what rate should be applied to lump sum settlements for participants in the Plan. Plaintiff's Exh. 64.

13. On December 15, 1980, the Committee adopted a policy of establishing an interest rate for lump sum payments as reflected in the following provision in its minutes:

> Mr. Roberts discussed the various options available under the pension plan—Joint and Survivor, Straight Life Annuity with Five-Year Certain, Level Income and

Lump Sum. All of these are permitted subject to approval of the Committee provided they are actuarially equivalent. To date, the only options elected have been either the Joint and Survivor Option or Straight Life Annuity with Five-Year Certain. Relative to the Lump Sum Option, a small amount could be approved by the Committee, or if it involved a large amount which possibly could seriously hamper the Plan, by law collateral would be required. Mr. Roberts explained the Committee needs to decide on the interest rate assumptions which will be used to calculate the amount of the lump sum. Mr. Roberts stated he has checked with various insurance companies and the rates they utilize, however, these vary from time to time depending on the money market. Also, the Pension Benefit Guaranty Corporation sets a rate usually for a period of three months which they use on any plans which are terminating.

Mr. Roberts suggested that the Committee adopt a policy which will provide for our establishing a factor for lump sum options at the time the request for a lump sum is received, based on the following:

Ascertain life annuity purchase rates from several insurance companies and the Pension Benefit Guaranty Corporation and establish the rate on an individual case basis with advice from A. S. Hansen, Inc. In this way, we can always stay current as to what the rates are. Fulton Federal's plan provides for a benefit of actuarial equivalent value. At present, we do not have a factor established for lump sum option.

After discussion by the Committee, Hugh W. Phillips made motion that the Committee investigate among various life insurance companies and other institutions to ascertain the current factor being applied to life annuities, and with advice from A. S. Hansen, Inc., make a decision on a rate for the particular benefit to be effective at the retirement date. The Committee will advise the participant of amount calculated as close to

retirement date as possible with stipulation that final calculation will use rate effective at retirement date. Motion was seconded and unanimously approved by the Committee.

Plaintiffs' Exh. 47.

14. According to Mr. Roberts, the December 15, 1980 action of the Committee was taken in fairness to all participants so as to assure all participants their proper share of the funds and not to give any participant any more than his fair share of the funds.

15. The December 15, 1980 decision of the Committee demonstrated a determination that lump sum payments would be calculated using an interest rate reflecting current market rates at or around the date of retirement of the participant. The decision obviously was made because prevailing interest rates in the latter part of 1980 had risen so high that there was substantial discrepancy between market interest rates and the interest rate assumed in the Plan. It was the culmination of discussions and investigations regarding the appropriate discount to arrive at present value for lump sum participants.

In addition to Plaintiffs' Exhibits 62 and 64, see, for example, Defendants' Exhibit 34 and the Actuary's memorandum dated 4/3/80 attached thereto.

16. The decision that a floating formula would be used to determine a fair market interest rate to be applied to lump sum payments was made before either plaintiff had made an election to have benefits paid under the lump sum option.

17. In making previous calculations regarding optional lump sum benefits and present values, the Plan administrators applied the 6% funding rate. The plaintiffs testified that it was on this basis they were led to believe, and did believe, that 6% was the interest assumption that would be used for discounting their normal pension benefits to present value. Defendants testified that in some instances, 6% was

near the market rate at the time, but that in all circumstances such were merely illustrative forecasts, or projections, of what might be because the actual market rate at time of retirement could not be known. They were made primarily for the purpose of projecting monthly income retirement benefits and social security benefits to illustrate the value of those benefits. The court find defendants' explanation credible *See* Plaintiffs' Exhs. 44, 111-114, 120-126.

18. Mr. Roberts testified that because of several discussions he had with Mr. Lewis, he believes plaintiff Lewis was informed of the policy adopted by the Committee on December 15, 1980, and as contained in the Committee minutes. Plaintiffs' Exh. 47. This was disputed by Mr. Lewis in his testimony.

19. Subsequent to December 15, 1980, but prior to October 28, 1981, plaintiffs Lewis and Embry indicated an intent to terminate employment on November 30, 1981 and January 15, 1982, respectively, and expressed an interest in the lump sum distribution benefit.

20. After their expressions of interest in the lump sum option, the Committee acted pursuant to its December 15, 1980 policy to adopt an interest rate for lump sum distribution and consulted with actuaries, insurance companies, the Federal Reserve Bank, its attorney and other sources to establish a proper and reasonable rate.

21. Although the Committee had anticipated the need to determine a basis for lump sum payments, no precise formula had been adopted by the Committee at the time Lewis and Embry indicated their interest because no lump sum payment had ever been made by the Plan up to that time. Upon receipt of plaintiffs' expressions of interest in the lump sum option, the Committee, through its Chairman, established a floating formula for determining the discount interest rate for plaintiffs and for all other persons electing the optional lump sum benefit.

22. The Committee learned that other plans were using floating formulas based on a variety of interest discount calculations, including the interest rate for Treasury Notes and Bonds at certain periods, the interest rates on Moody's AAA Bond Index, the Pension Benefit Guaranty Corporation interest rates and insurance company annuity rates.

23. The Committee, through its Actuary, received quotations reflecting the market interest rates at the time of Mr. Lewis's inquiries regarding the lump sum option. Plaintiffs' Exh. 17. Those market interest rates included the following:

PBGC rate	— 10.50%
PBGC rate effective 11/1/81	— 10.75%
Moody's AAA Bond rate plus 1%	— 12.10%
Average rate on 20-year Treasury Notes	— 13.65%
Bankers Life of Des Moines	— 15.55%
Massachusetts Mutual	— 16.20%

24. On October 28, 1981, the Committee determined to follow the recommendations of A. S. Hansen, Inc, the Plan's actuary, to calculate lump sum benefits on the twenty-year U.S. Treasury Note and Bond average for the fourth, fifth and sixth month immediately prior to retirement. Plaintiffs' Exh. 51.

25. The Committee on that same day approved a lump sum benefit of $122,404.65, utilizing an interest rate of 13.65% if plaintiff Lewis elected the lump sum option.

26. On October 30, 1981, plaintiff Lewis elected a lump sum benefit but subsequently contested the amount approved by the Committee.

27. Based on the same Treasury note and bond formula used for plaintiff Lewis, the Committee, on November 24, 1981, approved a lump sum benefit of $40,917.30, utilizing an interest rate of 14.5% if plaintiff Embry elected the lump sum option. Plaintiffs' Exh. 52.

28. On December 4, 1981, plaintiff Embry elected the lump sum benefit, but contested the amount approved by the Committee.

29. John T. Laury, account executive with A. S. Hansen, Inc., the Plan Actuary, testified that, in his opinion, the Plan's determination of actuarial equivalency was fair to the recipients and to the other members of the Plan.

30. The Committee considered appeals by the plaintiffs as to the amounts of their lump sum benefits and determined that said benefits were properly calculated.

31. Plaintiffs and their expert witness, Joe Gregg Bucklew, of Coopers & Lybrand, admitted that the interest rates and the formula applied by the Plan Committee were reasonable. While plaintiffs seemed to admit that the payment of lump sum benefits at a 6% discount rate would result in a windfall to them, nevertheless they argued that the Plan document and the law require the payment of this windfall.

Plaintiffs further contended that the 6% discount rate which should have been applied in computing their lump sum benefits was exactly equal to the investment return rate assumed by the Plan actuaries, A. S. Hansen, Inc., and that, as a consequence, it would result in no "unanticipated loss" to the Plan whereas use of a higher rate would result in an unanticipated experience gain or windfall to the Plan which ultimately inures to the benefit of the Plan's sponsor, Fulton Federal Savings and Loan Association, in the form of reduced minimum required contributions.

32. Regardless of who might be the recipient of such "windfall", plaintiffs have failed to prove that, in establishing interest rate to be used for the calculation of lump sum benefits, the Committee acted arbitrarily or capriciously or otherwise than in the interest of the Plan's participants and beneficiaries.

33. Plaintiffs and defendants differ with respect to whether or not the Committee has continually tendered the

lump sum amounts determined by it to be payable to plaintiffs until the same was accepted by plaintiffs on or about April 27, 1983. Plaintiffs contend that there was no unconditional tender and for this reason each plaintiff is entitled to interest from the date of retirement until the time the undisputed portions of the benefits at issue were paid to the plaintiffs. The court finds that the Committee has continually tendered the lump sum amounts determined by it to be payable to the plaintiffs and, accordingly, plaintiffs are not entitled to interest on the undisputed portion of their benefits.

34. Under the Agreement of Trust dated March 1, 1977, the Trustee is charged with the general administration of the Trust Funds. The general duties of the Trustee are set forth in Article II of that document, which provides, in pertinent part, that:

> The Plan Administrator shall have no authority to direct or control investment or change of investment of the Fund. Orders from the Plan Administrator need not specify the purpose of the payments so ordered, and the Trustee shall not be responsible in any way respecting the purpose or propriety of such payments or for the administration of the Plan. Any such order shall constitute a certification that the payment directed is one which the Plan Administrator is authorized to direct . . . It is expressly understood that the duties and obligations of the Trustee shall be only those expressly stated in this Agreement. If a dispute arises as to who is entitled to or should receive any benefit or payment, the Trustee may withhold or cause to be withheld such payment until the dispute has been resolved.

Plaintiffs' Exh. 6.

35. With respect to the Trustee's liability, Article VI of the Trust Agreement provides as follows:

> The Trustee shall not be liable for following the directions of the Plan Administrator unless it is clear on the face of such directions that the action to be taken by the

Trustee would violate said Trustee's fiduciary responsibilities as set out in the Employee Retirement Income Security Act of 1974 or be contrary to the terms of this Agreement.

CONCLUSIONS

1. This court has jurisdiction over this action pursuant to Sections 502(e) and (f) of ERISA, 29 U.S.C. § § 1132(e) and (f). Venue properly lies in this district. 29 U.S.C. § 1132(e)(2).

2. The individual defendants, whether Committee or Trustee, are fiduciaries within the meaning of ERISA and are bound to follow the terms of the Plan documents.

3. Section 1.02 of the Plan defines the term "actuarial equivalent" and states that it may be computed on the basis of the interest rate last adopted for purposes of the actuarial evaluation used to determine contributions to the Plan, "or on such other basis as may be adopted by the Committee". This provision grants the Committee the power to apply an interest rate to determine actuarial equivalency in connection with lump sum payments other than the interest rate used for determining the amount of contribution to the Plan by the Plan sponsor.

4. Plaintiffs argue that this provision is inconsistent with the provision of Section 11.05 of the Plan. *See* Finding of Fact No. 8, *infra*. Section 11.05 appears among the general provisions relating to the administration of the Plan by the Committee and it does not deal specifically with the question of actuarial equivalency involving the optional mode of payment by lump sum. The second sentence of Section 11.05, read in context with the first sentence, as it must be, strongly suggests that the entire section relates solely to actuarial calculations used to fix the rates of contribution payable to the Plan.

5. Should the general language of Section 11.05 be construed to require a single interest rate for all actuarial computations, as plaintiffs argue, it would be inconsistent

with the specific language of Section 1.02 of the Plan dealing with "actuarial equivalent" forms of benefits and with Section 12.04 of the Plan. The latter section provides that, upon termination of the Plan, the actuarial requirements of the Plan shall be determined by the Actuary by the use of such "interest rates" (plural) as the Actuary shall recommend and the Committee shall approve. The court concludes that the general provisions of Section 11.05 were not intended to, and did not, take precedence over or abrogate, the specific powers granted by Sections 1.02 and 12.04. The Committee properly interpreted Section 1.02 of the Plan to allow it to establish current fair market interest rates in discounting periodic benefits to present value for the lump sum option.

6. Plaintiffs contend that Section 11.05 of the Plan is the only provision which gives the Committee the power to establish an interest rate for purposes of computing lump sum benefits. Section 11.08 of the Plan sets forth the powers of the Committee, however, and those powers include the right to establish and enforce rules, to interpret the Plan, to decide all questions concerning the Plan and the eligibility of any employee, and to compute the amount of benefits which shall be payable to any participant. Section 6.03 grants the specific authority to make a lump sum payment of benefits, provided the amount determined is the actuarial equivalent of the normal benefit of monthly income defined in the Plan itself. Section 11.08, entitled "Powers of the Committee", provides as follows:

> 11.08 *Powers of the Committee.* The Committee shall have full power to administer and interpret the Plan,

including but not limited to the following powers and duties:

(a) To establish and enforce such rules, regulations and procedures as it shall deem necessary or proper for the efficient administration of the Plan;

(b) To interpret the Plan, its interpretation thereof in good faith to be final and conclusive, subject to the Claims Procedure described below;

(c) To decide all questions concerning the Plan and the eligibility of any Employee to participate in the Plan;

(d) To compute the amount of benefits which shall be payable to any Participant, Retired Participant, Beneficiary, or Spouse, in accordance with the provisions of the Plan and to determine the person or persons to whom said benefits shall be paid;

(e) To authorize the payment of benefits;

(f) To establish a funding policy and method as required by the Employee Retirement Income Security Act of 1974 and to review said funding policy and method no less often than annually. The Committee shall provide the Trustee with a written statement of said funding policy;

(g) To establish a Claims Procedure and Claims Review Procedure.

In the exercise of all its functions, the Committee shall act in an impartial, uniform and non-discriminatory manner.

7. Section 6.03 of the Plan is keyed to the definition of an actuarial equivalent contained in Section 1.02 of the Plan which provides that the actuarial equivalent shall be computed on the basis of the interest rate last adopted for purposes of determining contribution to the Plan "or on such other basis as may be adopted by the Committee." The

Committee thus had power under these provisions of the Plan to determine the interest rate for purposes of calculating lump sum benefits independently of the provisions of Section 11.05. The definition of actuarial equivalency in the Plan envisions an "either/or" option available to the Committee, that is, the use either of the funding rate or another rate. If the funding rate is the only rate which could be used, the reference to another basis for computing the actuarial equivalent would be not only superfluous but contradictory of that intent.

8. The second sentence of Section 11.05 specifically relates to establishing rates of contribution payable to the Plan, and the first sentence of Section 11.05 must be read in conjunction with the second sentence. If Section 11.05 is construed in its context to refer only to the funding rate, there would be no conflict between the two provisions. The evidence is undisputed that there can be, at any given time, only one rate of regular interest which, compounded annually shall be used in all actuarial computations for funding purposes. Although Sections 11.08, 6.03 and 1.02 grant authority for computing benefits, Section 11.05 is the only section in the Plan that grants authority to the Committee to establish the interest rate for purposes of determining contributions to the Plan.

9. In interpreting the Plan the Committee must act for the exclusive benefit of all the participants, and for no less than all. If there is, indeed, a conflict and ambiguity between the Plan document provisions, the Committee has the power to interpret and resolve any such ambiguity or contradiction, and it must do so in an impartial, uniform and non-discriminatory manner.

10. The Plan was not designed to provide windfall benefits. The Committee properly looked to the interests of all participants in preserving the assets of the pension trust and their interpretation of the Plan so as to effect the

purposes of the plan and the intent of the parties was in no way arbitrary or capricious.

11. But even if the court did not agree with the Committee's interpretation of the Plan, it must recognize the authority of the Committee under the powers enumerated in Section 11.08 of the Plan to interpret the same and to sustain its decision unless the plaintiffs can prove that its interpretation was arbitrary or capricious. *Sharron* v. *Amalgamated Insurance Agency Services, Inc.*, 704 F.2d 562 (11th Cir. 1983); *Paris* v. *Wolf, Inc. Profit Sharing Plan, Inc.*, 637 F.2d 357, *cert. denied*, 454 U.S. 836 (1981); *Bayles* v. *Central States, Southeast and Southwest Areas Pension Fund*, 602 F.2d 97, 99 (5th Cir. 1979). *Accord Denard* v. *Richards Group, Inc.*, 681 F.2d 306 (5th Cir. 1982).

12. In applying the arbitrary or capricious standard, courts consider various factors: (1) uniformity of construction of plan provisions; (2) "fair reading" and reasonableness of that reading; and (3) unanticipated costs. *Bayles*, 602 F.2d at 100. When viewed in terms of the Committee's proper and reasonable interpretation of the Plan and taking into consideration all of the facts and circumstances of this case, including the fact that the Committee adopted its policy of utilizing a fair market interest rate to value lump sum benefits in December of 1980, about one year before plaintiffs sought payment of lump sum benefits, the Committee's interpretation of the Plan was not arbitrary or capricious.

13. Had the Committee allowed plaintiffs to receive windfall benefits from the Plan through the use of totally unrealistic and unreasonable interest rates, the Committee could well have been liable to the remaining Plan participants and beneficiaries for allowing a depletion or diminution of the Plan assets. Under the exclusive benefit rule, "the fiduciary is forbidden from granting preferences between a plan's participants or as between a plan's beneficiaries," *Winpisinger* v. *Aurora Corp.*, 456 F.Supp. 559, 566 (N.D. Ohio 1978). Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), which requires a fiduciary to act "solely in the interest of the

participants and beneficiaries" of the Plan, is violated when the fiduciary jeopardizes the soundness of the fund by favoring one group over the remainder of the Plan participants or providing a greater benefit than otherwise is provided under the Plan documents. *Shaw* v. *Kruidenier,* 470 F.Supp. 1375, 1390 (S.D. Iowa 1979); *Winpisinger* v. *Aurora Corp.,* 456 F.Supp. 559, 566, 573 (N.D. Ohio 1978). Windfall payments to plaintiffs could have exposed the defendants to liability.

14. The Trustee, charged under the Plan and Trust Agreement with investing and managing the funds, not with the administration of the Plan, is not guilty of any fiduciary violation. The court concludes that the Trustee at all times acted solely in the interest of the Plan participants and beneficiaries in accordance with the documents and instruments governing the Plan. 29 U.S.C. § 1104(a)(1)(D).

15. Plaintiffs contend that defendants provided lump sum illustrations, estimates and projections using the 6% funding assumption rate as a discount factor and that it was on this basis that they were led to believe, and did believe, that the 6% interest rate would be used in discounting the normal benefit to present value. Ms. Embry received only the "Personal Statement of Benefits", in the same form as those received by Mr. Lewis, and they did not contain any lump sum estimate, projection or illustration relating to lump sum benefits. The "Personal Statement of Benefits" received by Mr. Lewis and Ms. Embry accurately stated their benefits. Plaintiffs' Exhs. 111-114.

16. The "Personal Statement of Benefits" included the following disclaimer:

> Reasonable measures have been taken to make your report accurate. However, the amount and availability of the benefits will be governed by the provisions of the legal documents pertaining to the various benefits reported. Your BENEFACTS report does not constitute such a legal document.

This is the kind of disclaimer recommended by plaintiffs' expert, Mr. Buckalew.

The only present value stated in the "Personal Statement of Benefits" was the following:

> It is interesting to note, it would cost approximately $__________ at age 65 to purchase your retirement and social security monthly benefits.

This statement does not constitute an estimate of benefits nor did it refer to any former benefits available under the Plan.

17. In the estimate or illustrated projection of benefits provided to Mr. Lewis in 1977, the testimony is unrefuted that the 6% discount factor there used was properly and reasonably applied because the prevailing market rates in 1977 were more or less consistent with the 6% interest rate, and further, the illustration of those benefits was an estimated projection which would only be available in the future. It was an estimate and the actual market rate, or for that matter the actual funding rate, at the time of Mr. Lewis's retirement could not have been known in 1977. Plaintiffs' Exh. 44.

18. Mr. Lewis was aware of his monthly annuity benefits pursuant to the Plan, and presumably he had access to the Committee minutes advising of the 1980 policy decision to apply market rates to discount normal benefits to present value. Plaintiffs' Exh. 47. Mr. Lewis was, therefore, apprised actually or constructively of the benefits which he could anticipate receiving. It is difficult for the court to understand how either Mr. Lewis or Ms. Embry, both bankers, could anticipate receiving lump sum payments based on an interest rate which clearly could not result in the actuarial equivalent of what they would have received as normal monthly income benefits.

19. Plaintiffs contend that the defendants' interpretation of the Plan and their actions resulting therefrom violate Rev. Rul. 79-90 and Rev. Rul. 81-12 promulgated by the

Internal Revenue Service. The court finds that those revenue rulings are inapplicable to this case and were not violated. Revenue Ruling 79-90 adopted a new policy requiring actuarial assumptions to be specified in a retirement plan. Revenue Ruling 81-12 is dependent upon Rev. Rul. 79-90 for its applicability, and does not apply to plans which are not yet required to comply with Rev. Rul. 79-90, due to the novelty of the policy set forth in Rev. Rul. 79-90, the IRS provided for delayed application of the revenue ruling to plans already in existence. The IRS stated:

> Inasmuch as employers may not have been aware that a plan must specify assumptions in these circumstances, this revenue ruling, pursuant to the authority contained in section 7805(d) of the Code, will not be effective for any plan in existence on March 12, 1979, until the first plan year beginning after December 31, 1983. At that time the ruling will be effective only with respect to participants who either separate from service or accrue benefits on or after the date the ruling applies to the Plan.

Plaintiffs' Exh. 105. The Fulton Federal Plan was in existence on March 12, 1979.

20. Revenue Ruling 79-90 also stated that it would be immediately effective as to plans already having specified assumptions within the meaning of the ruling. The Fulton Federal Plan does not specify its actuarial assumptions. There is no interest rate set forth anywhere in the Plan. Moreover, the interest rate used for purposes of determining contributions was subject to being changed from time to time in the discretion of the Committee. It cannot be said that there was a rate specified in the Plan which would have been outside the reach of the Committee's discretion, either for funding purposes or for lump sum discount purposes.

21. The discretion vested in the Committee for establishing a rate for funding purposes is sufficient to make Rev. Rul. 79-90 and Rev. Rul. 81-12 inapplicable to the Fulton Plan. In addition to having the authority to change the

interest rate used for purposes of determining contributions, the Committee also had discretionary power under Section 1.02 to determine actuarial equivalence on the basis of the rate used for determining contributions "or on such other basis as may be adopted by the Committee". This discretionary power demonstrates that no actuarial factor was already specified in the Plan. It is, therefore, clear that these revenue rulings are not effective as to the Fulton Plan until 1984.

22. If the exercise of Committee discretion to deny a lump sum benefit is appropriate, *Pompano* v. *Shiavone,* 680 F.2d 911 (2d Cir. 1982), the reasonable exercise of Committee discretion in a way which merely determines the amount of an optional lump sum benefit is not per se illegal.

23. The Committee made a continuing and unconditional tender of the lump sum benefits awarded under the Plan until such time as the tender was accepted and benefits were paid to the plaintiffs on or about April 27, 1983. As a consequence, the plaintiffs have no entitlement to interest on any portion of the benefits, including the undisputed portions.

24. Plaintiffs seek punitive damages in this case, without regard to whether or not defendants' conduct was sufficiently wilful, malicious or outrageous to justify the same in the normal circumstance. Plaintiffs have no right to punitive damages in this case because none are provided for under ERISA. "Ordinarily punitive damages are not presumed; they are not the norm; and nowhere in ERISA are they mentioned. If Congress had desired to provide for punitive damages, it could easily have so stated, as it has in other acts." *Dependable* v. *Falstaff Brewing Corp.,* 653 F.2d 1208, 1216 (8th Cir.), *cert. denied,* 102 Supreme Court 512, 641 (1981) (dictum); *Ziskind* v. Retail Clerks International Ass'n, __________F.Supp.__________. 3 E.B.C 1012 (E.D. Calif. 1982); *Calhoun* v. *Falstaff Brewing Corp.,* 478 F.Supp. 357 (E.D. Mo. 1979); *Hearn* v. *Retirement Fund Trust of Plumbing,* 224 F.Supp. 80 (C.D. Cal. 1976); *Pfister* v. *Delta Air Lines,* No. C78-1567A (N.D. Ga. Dec. 21, 1978) (appeal dismissed,

No. 79-3207 (5th Cir. Nov. 5, 1979)); and *Whittaker* v. *Texaco, Inc.,* No. C83-174A (N.D. Ga. June 27, 1983).

25. Under the standard set forth in *Ironworkers Local No. 272* v. *Bowen,* 624 F.2d 1255 (5th Cir. 1980), the prevailing defendants may be entitled to costs and attorney fees under ERISA, Section 502(g), 29 U.S.C. § 1132(g). According to *Bowen,* several factors should be considered in deciding whether or not to award attorney fees. They are: (1) the degree of the opposing party's bad faith or involvement; (2) the opposing party's ability to pay; (3) the deterrent effect on others in similar circumstances; (4) whether the parties seeking the fees sought to benefit others affected by the plan or to resolve a significant legal issue regarding ERISA; and (5) the relative merits of the parties' positions. *Id.* at 1266. Defendants argue that plaintiffs' refusal to accept their unconditional tender and to petition the court to force payment into the court's registry is sufficient bad faith to trigger the award. Defendants claim, in addition, that they defendants for the benefit of all participants and beneficiaries and, unlike plaintiffs who sought to benefit themselves, defendants' actions benefitted all participants and beneficiaries in protecting and safeguarding the Plan's funds and the integrity of the Plan's sponsor.

While there may be some merit to defendants' position, this court does not believe that plaintiffs were motivated solely by self-interests and bad faith. Considering the *Bowen* factors, the court declines to award attorney fees. Having concluded that plaintiffs are not entitled to any of the relief they seek, the Clerk is hereby ORDERED to enter judgment in favor of all defendants against all claims of the plaintiffs.

IT IS SO ORDERED.

This, the ____________ day of November, 1986

____

[¶8433] GRAND UNION COMPANY and INDEPENDENT TRANSPORTATION EMPLOYEES ASSOCIATION

JOHN E. SANDS, Arbitrator. June 2, 1982.

Pension Plans—Benefit Decrease—Lump Sum Option—Actuarial Equivalent

An employer did not violate its statutory duty to bargain or change its retirement plan when it changed the actuarial equivalent of the Plan's pension benefit, making the lump-sum option smaller under a new interest rate formula. Benefits were not reduced and the actuarial equivalent was defined as a benefit of equal value when computed on interest rates and actuarial tables last approved by the retirement board. The company was expressly authorized to change them and had done so several times before without complaint. When money can be invested at a higher rate of interest, it requires a smaller lump sum to fund a future stream of retirement payments, and the fall of the lump-sum option dollar amount was a "mathematical fact of life"—freezing the interest rate would have produced a lump-sum windfall. It was too late to address the issue, first raised in the Union's brief, of the company's refusal to give the union copies of the plan and the change.

William A. Ziegler (Sullivan & Cromwell), Attys., for the employer. Jane K. Finin (Grasso & Grasso), Attys., for the Union.

[Text of Award]

SANDS, Arbitrator; [GRIEVANCE]: On July 6, 1981 the Union initiated the following grievance, which it has timely pursued to arbitration by me:

> The Union has been informed that the Company has reduced certain benefits under its employee Retirement Plan. This reduction of benefits is in violation of Article 19 of the contract and the Company's statutory duty

to bargain. The Union therefore demands that the Company maintain all benefits under the Retirement Plan as heretofore earned and paid.

Issue

Did the Employer, the Grand Union Company, violate Article 19 of the parties' 1980-82 collective bargaining agreement as alleged in the July 6, 1981 grievance report? If so, what remedy is required by the parties' collective bargaining agreement?

In addition, the parties agree to submit to arbitration by me the issue of whether the Employer violated its duty to bargain under Section 8(a)(5) of the Labor-Management Relations Act of 1947, as amended.

[Facts]

On the entire record so produced I find the following relevant facts. Article 19 ("Retirement Plan") of the parties' 1980-82 collective bargaining agreement provides

> During the term of this Agreement, the Employer agrees to continue The Grand Union Company Employees' Retirement Plan with pension benefits unreduced at age 62.

The Grand Union Company Employees' Retirement Plan ("Plan"), which Article 19 incorporates by reference, is in the record before me as Joint Exhibit 4 ("The Grand Union Company Employees' Retirement Plan as Amended and restated Effective April 1, 1976").

That Plan provides for covered employees a principal benefit of normal retirement income. Section 5 of the Plan ("Amount of Retirement Income") provides for calculation of the monthly amount of retirement income. Section 5.2(b)'s reduction by one-half percent of the amount of monthly retirement income for employees retiring prior to their normal retirement dates does not apply to 62-year-old

employees under Joint Exhibit I's Article 19, which was amended by negotiations in 1976 to provide for retirement at age 62 "... with pension benefits unreduced ..."

Section 8 of the Plan also provides a number of optional Retirement Incomes, one of which, "Lump Sum Option," is at issue here. That section reads,

> Under this option the Participant receives, in lieu of monthly retirement income, the lump sum Aetuarial Equivalent value of his retirement income.

Section 1 ("Definitions") of Joint Exhibit 4 provides the following meaning for the term, "Actuarial Equivalent," at paragraph 1.1:

> "Actuarial Equivalent" shall mean a benefit of equivalent value when computed on the basis of the rate of the interest and the actuarial tables last approved by the Retirement Board for this purpose.

Section 10 ("Administration of the Plan") establishes a Retirement Board with ultimate responsibility for carrying out the Plan's provisions. Paragraph 10.7 provides, among the Retirement Board's administrative powers,

> The Retirement Board may from time to time ... adopt, upon the recommendation of the enrolled actuary, the basis for determining actuarial equivalence.

All of the foregoing Plan provisions are set forth in plain English terms in a pamphlet which the Employer has distributed to all employees entitled "Employees' Retirement Plan—The Grand Union Company."

The Plan in evidence as Joint Exhibit 4 is the most recent restatement of a plan which has been continuously in effect since 1945. Over those years the Retirement Board has, on a number of occasions, exercised its Section 10.7 power to adopt updated actuarial tables and rates of interest. New mortality tables appeared in 1966 and 1977. In 1966 the Board also approved an increase to 4% of the 2.5% rate of interest,

which had been in effect from 1945. In 1977 the Board approved a program to "phase in" another interest rate increase from 4% to 6.5%.

The change at issue in this case occurred in 1978 and became effective January 1, 1980. On May 8, 1978 the Retirement Board resolved to phase in a new interest rate for calculation of the actuarial value of the Lump Sum Option. That rate, designed "to properly reflect the current value of money," is calculated from the average yield on long-term United States Treasury notes and bonds during the twelve-month period ending two months prior to the month a claimant's benefits commence.

The Plan itself has also been the subject of collective bargaining negotiations between these parties over the period of their relationship. Examples of negotiated changes include the Employer's having assumed full responsibility in 1969 for what had been employees' contributions and, as noted above, 1976's effective reduction of normal retirement age from 65 to 62.

A continuing theme of the parties' negotiations and contract—even where the Union had tried without success to negotiate other improvements—has been an agreement that the Plan would remain "as is" through each contract's term. The most recent occasion of that undertaking occurred in April 1980, at negotiations for the parties' current contract. Employer representative [L.] promised Union representatives [E.] and [S.] that "the Plan would not be changed without first discussing it with the Union." At the hearing before me both [E.] and [S.] confirmed those precise words of [L.'s] undertaking—that "the 'Plan' ", not its actuarial underpinnings, would not be changed. On cross-examination the Union's witnesses also conceded that never before in the parties' relationship had Retirement Board changes of actuarial tables or interest rates been the subject of collective bargaining or grievances.

The Retirement Board's May 1978 resolution and its January 1980 impact surfaced during the spring of 1981. Responding to "rumors" that the Lump Sum Option had been reduced, the Union met with company representatives (including the Plan's consulting actuary, [C.] at Albany's Americana Hotel during May, 1980. At that meeting [C.] described the new interest rate formulation which he had recommended and which the Retirement Board had resolved in 1978 to implement effective January 1, 1980. Company representatives distributed a sheet of sample retirement benefit calculations which showed that bargaining unit employees who chose the Plan's Lump Sum Option would be receiving significantly smaller payments under the new interest rate formulation than they would have under the prior, 6.5% rate.

This result should, of course, have come as no surprise. As [C.'s] testimony reviewing the fundamentals of actuarial science confirmed, when money can be invested at a higher rate of interest, it requires a smaller lump sum to fund a future stream of retirement payments. Conversely, if interest rates were to fall, the lump-sum actuarial equivalent of the Plan's retirement benefit would be higher because smaller interest accruals would be available to fund benefit payments. When it thus became apparent that the amount of Lump Sum Option payments would be smaller, the Union initiated the grievance now before me for determination.

On these facts the Union argues that the Employer's unilateral action to increase the Plan's rate of interest reduced a pension benefit in violation of both Article 19 of the parties' contract and the Employer's statutory duty to bargain. The Employer, on the other hand, contends that the Retirement Board's action changed only the actuarial equivalent of the Plan's pension benefit, a matter which the Plan, incorporated by reference in the parties' contract, expressly authorizes. The Company accordingly insists that its exercise of an express term of the parties' contract violated

neither that contract nor the company's statutory obligation to bargain.

[Decision]

On the entire record before me I must reject this grievance as lacking merit. I reach that result for the following reasons.

First, I find that the Employer has not violated the clear words of the parties' collective bargaining agreement. Article 19 incorporates by reference "The Grand Union Company Employees' Retirement Plan with pension benefits unreduced at age 62." Article 19 and its predecessors have imposed that obligation since 1976, when the parties' negotiated full retirement benefits for retirees at age 62. During that period "The Grand Union Company Employees' Retirement Plan" has remained in effect with no change to the system of benefits it provides.

What the Employer's Retirement Board did in 1978 to impose a new interest rate calculation did not change that Plan or its pension benefits. By that action the Retirement Board did no more than to exercise a power which the Plan itself clearly authorized in Section 10.7.

That the dollar amount of Lump Sum Option payments may have fallen as a result of that action did not change the Plan or its benefits. That reduction was no more than a mathematical fact of life. Pension benefits remained the same, and the Lump Sum Option remained, as the Plan's words require, what it had always been—the actuarial equivalent of those pension benefits.

Second, I find that there has been no violation of the parties' negotiating intent, Article 19 and the parties' words across the bargaining table disclose an intent to guarantee a pension benefit program which would provide a set monthly payment to retirees and their beneficiaries. The Lump Sum Option of that program provides covered employees an

opportunity to withdraw from the Plan the actuarial equivalent of what would otherwise have been their earned pension benefits and to invest or spend that sum as they see fit.

I find nothing in the record to suggest that the Union sought or the employer granted an opportunity for retirees choosing the Lump Sum Option to receive a windfall at the expense of current and future retirees. That, however, is what the Union's position here would accomplish. Freezing the Plan's assumed rate of interest at an unrealistically low level would produce grossly inflated lump sum "actuarial equivalents" of retirement benefits. Employees choosing the Lump Sum Option could use those funds to purchase commercial annuities (computed at current, high interest rates) paying much higher benefits than the Plan; or they could purchase equal-benefit annuities and have a tidy nest egg for other purposes.

That result would not only provide an unfair advantage to those persons, it would as well deplete the Plan's assets and undercut its fiscal integrity for the payment of current and future benefits. I cannot believe the parties intended by their negotiations to accomplish a result so offensive to basic concepts of fairness and common sense.

Third, I find there has been no violation of the Employer's statutory duty to bargain. What the Retirement Board did here accomplished no unilateral change of wages, hours, or working conditions. In fact, the Employer exercised a power expressly reserved in the parties' collective bargaining agreement to ensure the continued fiscal integrity and equitable administration of The Grand Union Company Employees' Retirement Plan.

Moreover, what the Retirement Board did could not even be held to have violated reasonable expectations of employees or their collective bargaining representative. On four prior occasions the Retirement Board has exercised its power—expressly provided not only in the Plan but in the clear-language pamphlet distributed to all employees—to

adopt changes of interest rates and mortality tables. Each of those increases of interest and longevity assumptions necessarily reduced the lump sum actuarial equivalent of retirement benefits. On none of those occasions was there a claim of contractual or statutory violation. I find nothing in the record before me to distinguish the present case.

Finally, the Union's brief raises for the first time before me the argument that the Employer refused to provide to the Union upon its demand copies of the Retirement Plan and of the Retirement Board's 1978 Resolution at issue here, all in violation of the employee's statutory duty to bargain. The simple answer is that I have neither the arbitral authority nor a factual basis in the record before me to determine that issue. From the outset the Union's grievance, its opening statement, and its proof have identified the Employer's unilateral reductions of benefits—not its having withheld information—as the relevant refusal to bargain. Under these circumstances I must reject this aspect of the Union's argument.

By reason of the foregoing I issue the following.

Award

The Employer, The Grand Union Company, did not violate either its statutory duty to bargain or Article 19 of the parties' 1980–82 collective bargaining agreement as alleged in the July 6, 1981 grievance report.